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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 25

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

R. L. Angerer et al., etc.,

Appellees

vs.

No. 41

March Term, 1916.

Southern Traction Company et al.,

etc., Appellants.

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW



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Robert Appleby

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Illinois, as trustee,
Devin, a bank of
Company and other
Illinois, trustee,
Southern Trust

1911

134

CONFIDENTIAL

0-144-0

~~Indictment in No. 10,000.~~

[illegible]

Callagher & Co. to construct a line of railroad from the
company for the, alleged to have been for the
purpose of constructing a line of railroad from the
the construction of a line of railroad from the
to Belleville for the traction company, al-
leging that the defendant due for said work
\$4,481.04.

Joint answers were filed by the Southern Traction Company and the Lorick & Callagher Company to said petition on Feb. 2, 1914. On March 3, 1914, John A. Scott filed an intervening petition alleging that he had been employed by the Southern Traction Co. to do certain grading and related work; that said traction co. had filed its answer to the petition that on the 17th day of August 1913, he recovered a judgment against said Traction Co. for \$4,381.04; that execution had been issued and returned the said judgment and said judgment was on the property of said Southern Traction Co. It is further alleged by said intervening petition filed by said John A. Scott that he had performed other work in connection with the construction of said right-of-way and that when said construction was completed there was due him for said work a balance of \$1,100.00. Revised
On March 19, 1914, said Lorick & Callagher Company filed an amended petition setting forth practically the same facts as in its original petition, excepting that it charged that the amount owing to them was \$5,581.06. Said petition further averred that the contract for said work had been entered into between the defendant, Lorick & Callagher and the

The original petition was filed Dec.
ember 9, 1913, and on August 19, 1914

[illegible]

cases were found and will cause the jury to go to the master in, Mercury - said court a fact the evidence in said cases and reported the same to the court together with his conclusions of law and fact. The finding of the

former of defendant, and that defendant was, at the time, assigned all his right and interest in said contract and in any lien he might have for materials furnished to defendant, Robert Ableson, Jr. To said contract was attached the Union Trust and Savings Bank of West St. Louis, was a party defendant.

Answer to said amended bill praying relief from the matters and things averred therein, and in addition there to contained this averment: "This defendant answering further says, that it has not any interest in the Southern Trust Company of Illinois, as 'trustee or otherwise, except that the Union Trust and Savings Bank of West St. Louis, Illinois, holds twenty-five thousand dollars (\$25,000) of bonds or collateral security to secure on indebtedness of the Southern Trust Company, of St. Louis, Mo. of \$100,000, for the use of said bank, and that said bonds were not so collected by said bank to secure said indebtedness and that the defendant denies that it has any right to the said bonds are subject to any lien or claim of the Union Trust and Savings Bank, Jr., and that the right to said bonds to secure said indebtedness is a first and prior right thereto, and \$25,000 in bonds are sold as in the fact were never delivered."

When these things and the cause was referred to the Master in Chancery he said that the evidence in said cause and reported the same to the court for their with the conclusions of law and fact, the finding of the

master acting to the effect of...
the use of...
lien against the Southern...
that intervene...
a lien for purchase later...
tion of said right of way for...
entitled to a lien of judgment creditor...
road property for A, and B.

Said master also found that on... the
Southern Traction Co. issued bonds in the... amount
of \$1,500,000, which said bonds were secured by...
deed to the Union Trust and Savings...
said trust deed... for record in the recorder's of-
fice of St. Clair County on the 7th day of November, 1901.
The circuit Court... confirmed the record of said
master and entered a decree in accordance therewith.

The evidence... that the
Southern Traction Company... organized under the railroad laws of Illinois. The purpose of
the company was to build an electric railroad from Atlantic
across the... bridge... to
Belleville, Illinois, and to...
fact of Belleville. It was organized prior to 1900. Its
principal organizer was one... of St. Louis,
Missouri. On November 16, 1901, it executed a mortgage to
a... Union Trust and Savings... to secure
the payment of \$1,500,000 of its bonds, the mortgage
being dated January 1, 1901, and was filed for record in
the recorder's office of St. Clair County November 7, 1901.

Very little work was done in the building of the line from
East St. Louis to Belleville until 1913. The entire stock
of the Southern Traction Company was 1,500,000 shares of
which was owned by H. L. Scherer, 100,000 or 6 2/3 percent.
The stock was after increased to 2,000,000 shares. There is
no evidence that any additional stock was ever issued.

On July 1, 1913, the Southern Traction Company
entered into a contract with the Erie Railroad Company, for
the building and equipping of the railroad, and on the same
day, Scherer entered into a contract with the Erie Railroad
Company for the construction of that part of the
railroad from East St. Louis to Belleville.

The evidence further discloses that on June 1,
1913, at Belleville, Ill., Scherer entered into a contract with
the Erie Railroad Company for the furnishing
of ties to be used in the construction of the road be-
tween East St. Louis and Belleville. The evidence tends to
show the ties were furnished from November 1, 1913.
Scherer served a notice upon the president of the Southern
Traction Company claiming a lien upon the property
of the Southern Traction Company to secure the amount due
him from the Erie Railroad Company under his contract
with it for the furnishing of ties.

Thereafter on December 3, 1913, Scherer assigned
his interest in said claim to J. Edgar, Toledo.

In the decree rendered by the Circuit Court it made
a finding to the effect that the Erie Railroad Company
had gone into bankruptcy and that the Southern Traction Com-

master being to the effect that appellee, . . . Angerer, for
 the use of an office, Robert Angerer, was entitled to a
 lien against the Southern Traction Co. for \$2,000.00, and
 that intervening petitioner, John . . . Angerer, was entitled to
 a lien for work and labor performed by him in the construc-
 tion of said road of any part, but that he was
 entitled to a lien as judgment creditor of said said rail-
 road property for \$4,000.00.
 Said master also found that on Jan. 1, 1907, the
 Southern Traction Co. issued bonds in the aggregate amount
 of \$1,000,000, which said bonds were secured by a trust
 deed to the first trust and savings bank, Chicago, which
 said trust deed was filed for record in the recorder's of-
 fice of St. Clair County on the 15th day of November, 1906.
 The circuit court on hearing confirmed the report of said
 master and entered a decree in accordance therewith.
 The evidence disclosed about other things that the
 Southern Traction Company is a railroad corporation, or-
 ganized under the railroad laws of Illinois. The purpose of
 the company was to build an electric railroad from Chicago
 across the municipal bridge across the Chicago River to Bel-
 levue, Illinois, and to other points east and south-
 east of Bellevue. It was organized prior to 1903. Its
 principal organizer was one J. J. Angerer, Jr., of Chicago,
 Illinois. On November 16, 1906, it executed a mortgage to
 appellant, which mortgage was recorded to secure
 the payment of \$1,000,000 of bonds, the proceeds
 being dated January 1, 1907, and was filed for record in
 the recorder's office of St. Clair County November 2, 1906.

Very little work was done in the building of the line from East St. Louis to Belleville until 1911. The capital stock of the Southern Traction Company was \$1,500,000, all of which was owned by C. J. Schenck, Jr., except 25 or 27 shares. The stock was after increased to \$2,500,000, but there is no evidence that any additional stock was ever issued.

On July 1, 1911, the Southern Traction Company entered into a contract with the said C. J. Schenck, Jr., for the building and equipping of the railroad, and on the same day, Schenck entered into a contract with the Lorimer & Gallagher Company for the construction of that part of the railroad from East St. Louis to Belleville.

The evidence further discloses that on June 1, 1912, appellee, C. J. Angerer entered into a written contract with the Lorimer & Gallagher Company for the furnishing of ties to be used in the construction of the road between East St. Louis and Belleville. The evidence tends to show the ties were furnished and on November 21, 1912, Angerer served a notice upon the president of the Southern Traction Company claiming a lien upon all of the property of the Southern Traction Company to secure the amounts due him from the Lorimer & Gallagher Company under his contract with it for the furnishing of ties.

Thereafter on December 2, 1912, Angerer assigned his interest in said claim to appellee, Peles.

In the decree rendered by the Circuit Court it made a finding to the effect that the Lorimer and Gallagher Co. had gone into bankruptcy and that the Southern Traction Co.

[illegible]

was in the hands of a receiver and that the court would not undertake to determine the right of priority between said lien holders and the lien of the Union Trust Bank, trustee, and found that this question would have to be determined by the United States District Court which said matter was pending.

The decretal order of the trial court, however, provided for a sale of the property of the Southern Traction Co. and out of the proceeds it was ordered that the matter in controversy pay the costs first out to said proceeding, including the commissions, and that he next by the judgment held by appellee, John A. Logg, and out of the residue of said funds, it was to pay to the amount found to be due to appellee, for the use of sales, and the amount found to be due appellee, for his intervention - addition, but made no provision for payment of any amount to the

Union Trust Bank. Verdict, rendered by the jury, Southern Traction Co. for a recovery of said decree. The trial court held that the appellee was subordinated to the contract for and that therefore under the lien it was due would not be entitled to a lien. The court then decided as to whether the former is entitled to a lien, and the contractor for the building of said road between St. Louis and Effville or better it was a sub-contractor under the act.

The record discloses that the Southern owned all of the stock of said road consisting of 1,000 shares, and that execution of the twenty-five or thirty shares, and that

2. said contract was made by the said parties
a. upon the basis of the said contract, and
The evidence further discloses that
the said contract was made by the said parties
into a contract with the said parties, and
a contract to the said parties, and
he is said to have entered into a contract with the said parties
and the said parties, and the said parties, and
from the said parties, and the said parties, and
so entered into with the said parties, and the said parties, and
provided that said parties, and the said parties, and
of the said parties, and the said parties, and
state said parties.

It was further proved in this case that between
the said parties, and the said parties, the said parties
the said parties, and the said parties, and the said parties
entered into by the said parties, and the said parties, and
the evidence further discloses that the said parties, and the
contract entered into between the said parties, and the
said parties, and the said parties, and the said parties, and
contract with the said parties, and the said parties, and
the said parties, and the said parties, and the said parties, and
with the said parties, and the said parties, and the said parties, and
said contract being the said parties, and the said parties, and
Illinois, merely amounts to the said parties, and the said parties, and
without any conditions in said parties, and the said parties, and
of the said parties, and the said parties, and the said parties, and
and immediately in the said parties, and the said parties, and
the said parties, and the said parties, and the said parties, and

in said all of the bonds issued by said Southern Traction Co. amounting to \$1,500,000, with the exception of \$250,000.00. The evidence further discloses that certain was acting as the General Agent of said company and that while he entered into a contract with the Southern Traction Co. in which he agreed to construct the proposed road, at the same time he immediately entered into a contract with the Gallegos Co. to build that part of said road extending from near St. Louis to Belleville, in which said contract he entered into with the latter a covenanter Co. it was provided that said construction company was to furnish all of the materials and do all of the work necessary to complete said railroad.

It was further provided in the contract between the Southern Traction Co. and the Gallegos Co. that said Traction Co. would, however and at no time for any contract entered into by him for the building of said road. The evidence further discloses that contemporaneous with the contract entered into between them and the Gallegos Co. the Southern Traction Co. entered into a contract with the latter a covenanter Co. guaranteeing the faithful performance of the contract entered into by them with the said covenanter Co. The Traction Co. said contract being that the Southern Traction Co. of Illinois, hereby covenants to and releases all the terms, provisions and conditions in said contract and to itself directly and indirectly it is to said covenanter, Gallegos Co. for the faithful performance of the contract entered into by them

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Item: _____ **File Number:** _____

It is not possible to say that the

1. The first of these is the fact that the

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

before the Circuit Court and cannot in this case be
raised for the first time.

It is not contended by the plaintiff, who is

petitioner, that the defendant's motion was not
made in time to be considered by the court, and that
due to the manner in which the defendant's motion was
made, it is not necessary for the court to consider it.

This contention is supported by the fact that the

defendant's motion was made after the expiration of the

time specified in the order of the court, and that the

defendant's motion was made after the expiration of the

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the former, Defendant ... ordered the ...
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him to explain the fact that he had not been able to find any other information on the subject of the alleged contact between the two men. He also stated that he had not been able to find any other information on the subject of the alleged contact between the two men.

[illegible]

in our line of business, we have been able to maintain a high level of service and quality, and we are confident that we will continue to do so in the future.

[illegible][illegible]

[illegible]

to begin with, the answer filed by the Union
 Trust & Savings Bank to the amended petition of appellants
 answered and relies does not disavow belatedly the in-
 terests the Union Trust & Savings Bank was out to preserve
 present. The contention naturally to be drawn from the
 answer filed by said bank would be that the only thing it
 was interested in was to have a lien established in its
 favor as to the \$25,000. In bonds held by it as collateral
 first security for a note given by Nathan and others, and
 that so far as the holders of the other bonds for which
 the trust deed was made to it was executed, it did not
 concern itself. The record in this case does not even
 disclose that the bond of \$25,000, which said bank
 claims to hold as collateral security for a \$40,000 note
 given by Nathan and others were even reduced in evidence,
 and they are not shown in this record.
 Edward T. Keener, one of the officers of the
 Union Trust & Savings Bank testified that a petition, which
 Trust & Savings Bank was a defendant in another suit pending
 in the Federal Court with reference to the same bonds (that
 is the bonds secured by the trust deed held by said bank)
 and that it had set up its rights by an answer filed in
 that suit. He also testified "I don't know who are now
 the owners and holders of the \$1,475,000 worth of bonds
 that were sold over to . . . Nathan, et al. It was stated
 at the trial by Judge Cook, who represented the Union
 Trust & Savings Bank that we are giving this evidence of
 the fact that the parties who brought us in here, but we
 are not objecting to a suit in the Federal Court and have

filed on answer thereto. The witness further testified that he had been enjoined from doing any work over his own company then, even though it is the case that anybody but we are ready and willing to do the work under an order or decree of the court and we are ready to do so."

It was, therefore, not surprising that the court did not err in its decision to order the Union Trust Company to pay the order lien to the appellees.

It is left to the court to decide whether the Union Trust Company is a party to the original petition filed by appellees, in order and, hence, that, therefore, the court is not authorized to litigate with the Union Trust Company the question of its liability and that the court to which lien by its client, Union Trust Company, is to be paid before the court is a matter of fact. In view of what has already said it is hardly necessary for us to say on this question. However, as it has been raised and so vigorously urged it will probably not be amiss for us to consider the same in this opinion. As to the lien, the lien claimed by appellees is under the provisions of the contract which provides upon proper notice being given for a lien in favor of a sub-contractor where the original contractor has failed to complete his contract and has abandoned the work. Section 1 of said act further provides, "that the lien hereby created shall continue for three months from the time of the performance of the sub-contractor's duty of the

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very long letter, and it contains a great deal of information about the state of the country at that time. It is a very important document, and it is one of the most interesting documents in the collection.

The first of these is the fact that the
 Government has been unable to secure
 the necessary funds to carry out its
 policy of maintaining the value of the
 pound at its pre-war level. This has
 led to a series of devaluations which
 have had a disastrous effect on the
 economy. The second is the fact that
 the Government has been unable to
 secure the necessary funds to carry out
 its policy of maintaining the value of
 the pound at its pre-war level. This
 has led to a series of devaluations
 which have had a disastrous effect on
 the economy. The third is the fact
 that the Government has been unable to
 secure the necessary funds to carry out
 its policy of maintaining the value of
 the pound at its pre-war level. This
 has led to a series of devaluations
 which have had a disastrous effect on
 the economy.

work or furnishing the same and as the court said, the
which suit should be considered by the court, and
in such cases the lien shall be enforced by the court
in such cases. The court, Union Trust Co. v. ...
neither by also in the text, the court said, the
of litigation raised the question in the court, the
right of appellees to maintain their suit, the court
of not having said it a party to the suit, the court
specified in said statute. The court said, the court
its right to do and one of the court said, the court
this question in this court. Therefore, the court said, the court

It is further concluded by specification, that the
court said that it should have been said a party defendant
to the intervening petition of John A. ... We do not
think this point well taken as the intervening petition filed
by appellee amounts in effect to an answer to the original
petition filed by appellee, neither as a cross bill, nor as a
counter to a cross bill.

In the hearing before the master and throughout the
trial counsel for all appellees contended that they were en-
titled to in this proceeding to establish their right to
a lien; that the trial court had no power to determine the
matter of preference or between the lien of the appellees and
the lien of the Union Trust Co. v. ... under its trust
deed and that they were not entitled to a share of the prop-
erty of the Southern Fraction Co. to satisfy said lien for
the reason that proceedings were pending in the United
States District Court wherein said matters would be deter-
mined and adjudicated.

the Southern section of the record is not so much. The Union Trust Company is not a party to this proceeding, that is seriously resisting the determination of priority among the lien holders, would be a party to this proceeding. Our holding in reference to the determination made by said Union Trust Company's book is a determination of priority between the lien held by it under said trust deed and the lien of appellants, in that said Union Trust and Savings Bank has left the record in such an unsatisfactory and indefinite condition with reference to the claim for lien made by it that without reference to the proceeding pending in the United States District Court, neither the Circuit Court, nor this Court could advisedly determine the same, and we shall not undertake to do so on this record.

Other errors were assigned, but the record has already said practically covers all questions raised by such assignments so far as necessary. The decree of the Circuit Court will therefore be reversed and the case remanded with direction to disallow those liens claimed by appellants, Singer and others, in the amended petition that were not included in the original petition, and that the matter of priorities between the Union Trust Savings Bank and appellants as lien holders herein be not determined in this proceeding so long as the United States District Court has jurisdiction thereof.

Very read and directed with directions.

Not to be reported in full.

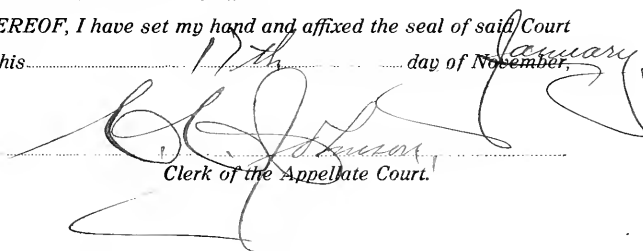
much. The Union Trust & Savings Bank is the only party to this proceeding that is seriously insisting that the question of priorities among the lien holders should be determined in this proceeding. In holding in reference to the condition of priority made by said Union Trust & Savings Bank for a determination of priority between the lien held by it under said trust deed and the lien of its officers, it has said that Union Trust & Savings Bank has left the record in such an unsatisfactory and indefinite condition with reference to the claim for lien made by it that without reference to the proceeding pending in the United States District Court, neither the Circuit Court, nor this Court could advantageously determine the same, and we will not undertake to do so on this record.

That error was assigned, but it is already said practically covers all questions raised by such assignments so far as necessary. The error of the Circuit Court will therefore be reversed and the cause remanded with direction to dissolve those liens claimed by officers, managers and others, in the proposed petition for sale of the property in the original petition, and that the matter of priorities between the Union Trust & Savings Bank and officers as lien holders herein be not determined in this proceeding so long as the United States District Court has jurisdiction thereof. Covered and remanded with directions.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 12th day of January,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

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2365

Present:

203 I.A. 28

Hon. Harry Higbee, Justice.

THOMAS E. PASLEY, Sheriff.

Joseph Bisencon,
Appellant
vs.
No. 42
March Term, 1916.
Wesley Walters,
Appellee

Circuit..... COURT

St. Clair COUNTY

HON. GEORGE A. CROW



Term No. 48

In the State Court

of Illinois, Fourth District,

March Term, 1911.

Joseph Lawrence, Plaintiff

vs.

Wesley Brown, Defendant.

of the County of Cook,

Opinion by Judge J.

On motion of defendant for judgment of dismissal, the court, at the April term, 1911, directed by the court a jury resulted in a verdict in favor of plaintiff and in a judgment in favor of plaintiff for costs, from which defendant appeals.

The land in controversy is situated in the village of Canokis, Illinois. Plaintiff and defendant are both tenants, Plaintiff being a tenant in fee simple, and defendant claiming to own a tract of about 10 acres, which tract included the 2.46 acres above mentioned, ~~being a~~ ^{and defendant} being a tenant at the widow of Joseph Leslie, who claimed an interest in said above described premises.

~~Propositions of law were submitted to the court or argued by the trial court on the hearing of said case, and no objection is raised on the pleading, the only~~

Form No. 4
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ters to be determined by this court under the rule of
of errors in, first, whether the court erred in relying
on the evidence, and, second, whether the finding of the
court is against the manifest weight of the evidence. See
v. Bourgeois, 113 111. 211; 114 v. Ferguson 111 111.

Numerous objections were taken to the evidence
the court on the evidence tendered on the trial, but practically all of these objections were waived by not being
argued in appellant's brief. A sufficient reason for the
court's refusal to allow the witness, Litzman, to
testify in reference to a survey he made of certain land
claimed to be owned by appellant, was, and which will be
include the tract of land in controversy. The court examined
the record in connection with this objection and find that
the witness Litzman was acting as the agent of Busch, and
whatever survey he purported to make he made it at the
instance of Busch, without appellant or his land being
present, or without their having been notified to attend so
we are of the opinion that the court did not err in refusing
to hear this testimony. If any rate, no error resulted from
this ruling as said witness was allowed to testify that he
owned the 190 acre tract above referred to, which included
as a part of the same the premises in controversy, to be
fenced, and that as the agent of said Busch, he rented said
190 acre tract of land to the appellant.

In an action of this character, the possession or
the right of possession of the premises is the only matter
in controversy, and the evidence should be confined to this

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issue. *Kepley, v. Duke*, 107 Ill.258; *Millen v. ...*,
134 Ill.532; *Thorne v. Clemick*, 237 Ill.167.

The only other ruling on the evidence that appellant complains of is that the court refused to consider on the hearing certain tax receipts offered by appellant which tended to show that during certain years preceding the bringing of this suit, Angel, had paid the taxes on the whole, or a part of the premises in controversy. We do not believe that this evidence was material, and even, if material, the offer of this evidence was made in chief, but in rebuttal, and for that reason alone the court would have been warranted in refusing to consider the same, and this evidence if proper at all, should have been offered in chief.

It is insisted by appellant that August A. Busch went into possession of a tract of land containing a little over 180 acres under a deed from a man by the name of Wiermann on or about the 12nd day of June, 1881, and, that he has continued in possession of said premises from the date of said deed until the bringing of this suit. On the other hand, appellee insists that the possession of the premises in controversy has been in those through whom he claims more than sixty years.

~~This evidence further discloses~~ [X] Some sixteen
or sixteen years prior to the bringing of this suit ^{defendant} ~~the~~
went into possession of said premises under the title, who gave him the right to occupy the same on his agreement to clear the land. ~~The evidence also is to the effect that~~

Defendant

Defendant farmed a part of said premises and lived on thereon which he sold at the value of \$10,000.00. Defendant was residing on said premises for a long period of time in said City and stayed there ten years. Defendant lived on the premises about eighteen months before suit was brought. Defendant is sometimes called by the witnesses, a clerk, and the evidence discloses, Defendant was living at the time the suit was brought and at the time of the hearing.

~~It is contended by appellant that when appellee came back from the City he sought to make an application to cut some of the timber on the land occupied by appellee, being other than the land involved in this proceeding, and that appellee refused to allow him to do so, but it is not contended by appellant that he made any application to appellee occupying the premises in controversy in this suit. Appellant's testimony was to the effect that while plaintiff he had covered the 5.46 acres in controversy, he never had farmed it, or made any use of it, and in fact, the testimony of the witnesses, both on the part of appellant and appellee, is to the effect that plaintiff use whatever had been made of the 5.46 acres of land by appellant under his lease.~~

Defendant The evidence is to the effect that plaintiff No one erected a house while building said house or in his occupation of said premises until this suit was brought. ~~the holding of the county clerk was not necessary entry, neither does the evidence disclose that he is holding the possession of said premises or property after having obtained possession thereof, for the reason, since of the evidence is to the effect that the appellee through whom~~

Police [redacted]

[Plaintiff

claim, have been in possession of said tract since 1900 and during all that time it was enclosed by a well maintained fence of the same, and for some time prior to the bringing of this suit.]

It is claimed by defendant that the tract was never tract fenced in and that a well maintained fence was never erected around the premises occupied by defendant, and that the fence was never maintained around the entire tract, and that defendant did not have to go through defendant's fence in order to gain admittance to said premises. This is not a proceeding to try the right of title, but is a preliminary action, and the evidence clearly indicates that the trial court was fully warranted in finding the facts in favor of plaintiff on the controverted questions of fact.

The evidence further discloses that plaintiff was acting as the agent of defendant to purchase defendant's right to said premises, and offered to pay him \$1000 therefor. It was contended by defendant that this was an offer of compromise, but the evidence, we think, preponderates to the effect that this offer was made before this litigation had commenced, or before it was seriously contemplated. At any rate it is a circumstance tending to show that plaintiff was not wrongfully in possession of said premises. There being no serious error in the record, the judgment of the trial court will be affirmed.

Judge of the Court.

Not to be reported in full.

Handwritten signature/initials in a box.

Office of the Secretary of the Interior

Department of the Interior

Washington, D.C.

June 1, 1906

Dear Sir:

I have the honor to acknowledge the receipt of your letter of May 31, 1906.

The enclosed is a copy of the report of the

Surveyor General of the Territory of New Mexico.

Very respectfully,

John D. Smith

Secretary of the Interior

Enclosure

The above is a copy of the report of the

Surveyor General of the Territory of New Mexico.

Very respectfully,

John D. Smith

Secretary of the Interior

Enclosure

The above is a copy of the report of the

Surveyor General of the Territory of New Mexico.

Very respectfully,

John D. Smith

Secretary of the Interior

Enclosure

The above is a copy of the report of the

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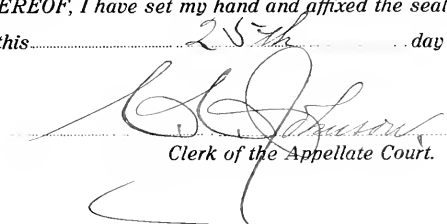
Very respectfully,

John D. Smith

Secretary of the Interior

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 25th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

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2361

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 46

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Ford Motor Co., etc.,

Appellant

vs.

No. 51

March Term, 1916.

Charles Fry,

Appellee

ERROR TO
APPEAL FROM

Circuit COURT

Wabash COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON

bodied and specified herein, and to the extent that it will be recognized unless approved of in writing by the resident or vice-resident of the factory. If defendant then entitled to recover under his contract, the evidence disclosed that he had returned to accept the car tendered by appellant. Appellant insisted that the dealer was not required to accept the car because it was damaged and he refused to accept it. Appellant also testified that the car was damaged by appellant did not comply with the contract for the reason that it was equipped with a self-starter and a radio. Appellant testified that its work was not done without reference, however, to its agent. The evidence disclosed that on the day of the accident, appellant, through its agent, Keyser, offered the car on the same terms and conditions it had been sold to appellee. Keyser testified: "I said that I offered to deliver to try to locate a car for the kind of a contract I have with my." This being the testimony of the agent of appellant, it is binding on appellant. Under the provisions of the contract of the contract entered into between appellant and appellee on the refusal of appellee to accept the car, the car is recoverable by appellant to a third person on the same terms and conditions as sold to appellee, it did not amount of damages which appellant can claim under the provisions of its contract to the sum of twenty-five dollars.

It is admitted by appellant that it retained the

21. 11. 1931

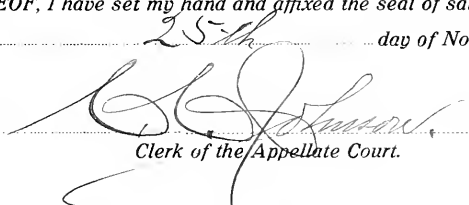
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It was also... right to recover... its agent... excepted... has been... tion for... none... came...
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...of... retaining... as the... two... count... this... involved... and... state... also...
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 25th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 48

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Leonard Hoehn,

Appellee.

vs.

No. 52

March Term, 1916.

East Side Levee & Sanitary

District,

Appellant.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER



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waters from adjacent land flow into it. It is a question of fact and that, prior to the construction of said diversion channel and said levee, the waters were not so confined as to never caused serious damage to the crops of a neighbor. The evidence further tended to prove that the water never flowed on appellee's land at any great length of time prior to the construction of said levee. It was, therefore, a question of fact for the jury as to whether or not the levee constructed by appellant along the south line of appellee's land did in fact obstruct the flow of the water as averred as charged in appellant's declaration, and the evidence tended to prove the allegations thereof to the extent as to say the finding of the jury is correct in its weight. In fact, we are of the opinion that the evidence preponderated in favor of appellee's contention to the effect that said levee did obstruct the flow of said water.

It is contended by appellant upon several things that no legal duty rested upon it to refrain from obstructing the flow of surface water from the surface of adjacent land and that no legal duty rested upon it to provide an outlet for such waters. This is not an open question with this court. In the case of *Palmer v. The First State Levee and Territorial District* (appellant here) on July 15, 1919, we rendered an opinion in which this question was given life and was passed upon. Among other things this court in discussing the contention that appellant would not be liable for obstructing of the flow of said surface water says: "a correct understanding of this contention. It would hardly be reasonable to say that

before the court. The court found that the defendant had been in the area of the crime scene at the time of the crime. The court also found that the defendant had been in contact with the victim at the time of the crime. The court concluded that the defendant was guilty of the crime.

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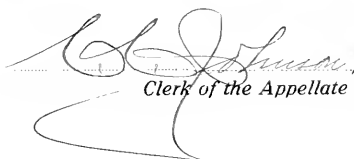
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this..... 17th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

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203 / 2

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 58

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

H. T. Miller and Homer Miller,
Appellees.

ERROR TO
APPEAL FROM

vs.

No. 63

Circuit COURT

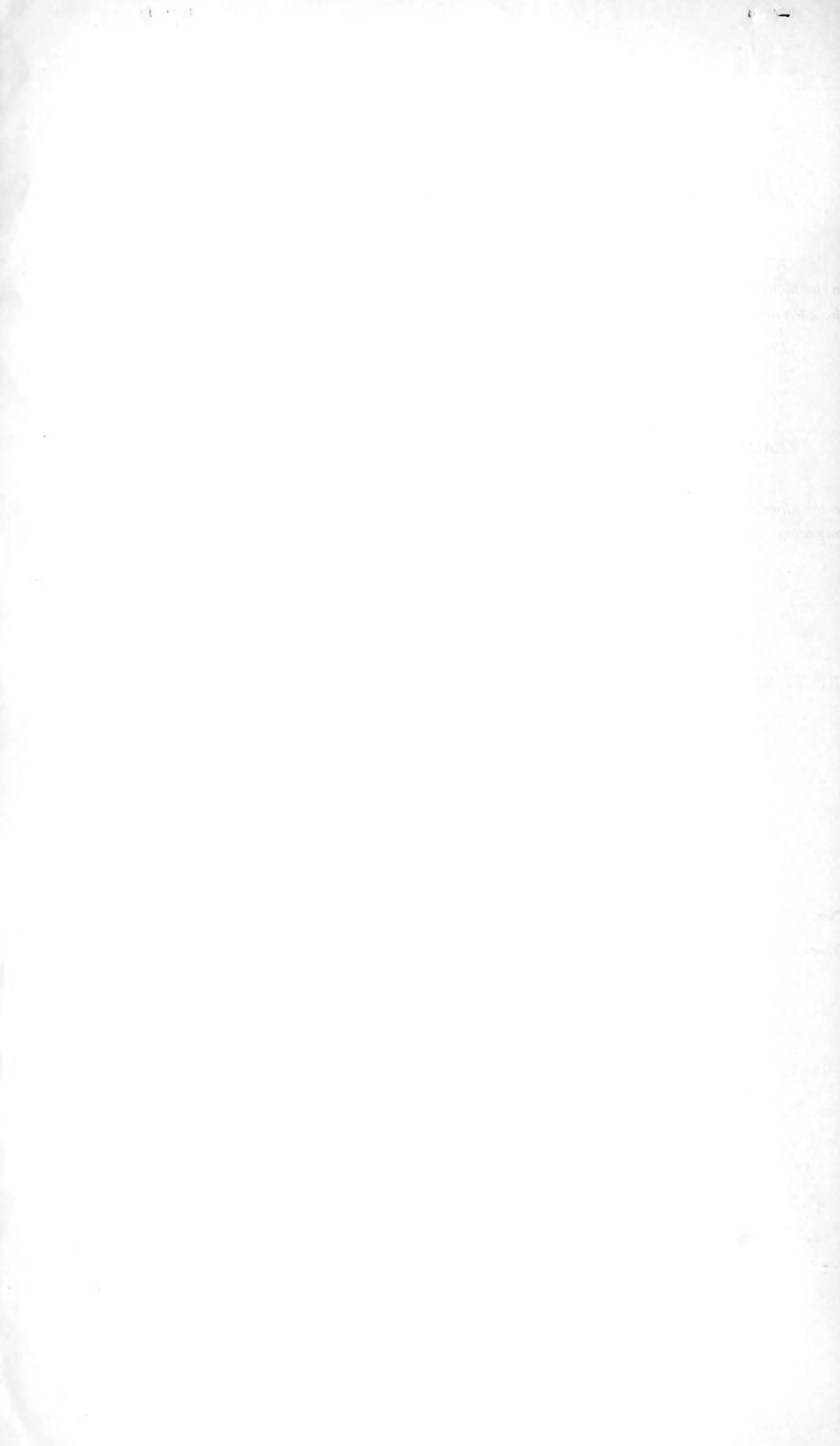
March Term, 1916.

George W. Mayberry, et al,
Appellants.

Wayne COUNTY

TRIAL JUDGE

HON. JULIUS C. KERN



Date: 6/67 In the District Court of the United States for the District of Columbia
 at Washington, North District.
 John Doe, Plaintiff, vs. Jane Doe, Defendant.

$$\frac{d}{dt} \left(\frac{\partial L}{\partial \dot{x}} \right) = \frac{\partial L}{\partial x}$$

it is not a good idea to have a large number of people in the same room. It is better to have a few people in a few rooms. This is especially true if you are in a public place. It is also a good idea to have a few people in a few rooms. This is especially true if you are in a public place.

The following are the names of the people who were in the room on the day of the incident. They are listed in alphabetical order.

1. John Doe
 2. Jane Smith
 3. Bob Johnson
 4. Alice Brown
 5. Charlie White
 6. David Black
 7. Eve Green
 8. Frank Red
 9. Grace Blue
 10. Henry Yellow
 11. Ivy Purple
 12. Jack Orange
 13. Karen Pink
 14. Leo Silver
 15. Mia Gold
 16. Noah Bronze
 17. Olivia Copper
 18. Peter Iron
 19. Quinn Steel
 20. Rachel Tin
 21. Sam Lead
 22. Tina Zinc
 23. Umar Nickel
 24. Victor Platinum
 25. Wendy Silver
 26. Xavier Gold
 27. Yara Bronze
 28. Zoe Copper
 29. Adam Iron
 30. Eve Steel
 31. Frank Tin
 32. Grace Lead
 33. Henry Zinc
 34. Ivy Nickel
 35. Jack Platinum
 36. Karen Silver
 37. Leo Gold
 38. Mia Bronze
 39. Noah Copper
 40. Olivia Iron
 41. Peter Steel
 42. Quinn Tin
 43. Rachel Lead
 44. Sam Zinc
 45. Tina Nickel
 46. Umar Platinum
 47. Victor Silver
 48. Wendy Gold
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 55. Grace Zinc
 56. Henry Nickel
 57. Ivy Platinum
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 63. Olivia Steel
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 65. Quinn Lead
 66. Rachel Zinc
 67. Sam Nickel
 68. Tina Platinum
 69. Umar Silver
 70. Victor Gold
 71. Wendy Bronze
 72. Xavier Copper
 73. Yara Iron
 74. Zoe Steel
 75. Adam Tin
 76. Eve Lead
 77. Frank Zinc
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 79. Henry Platinum
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 81. Jack Gold
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 83. Leo Copper
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 88. Quinn Zinc
 89. Rachel Nickel
 90. Sam Platinum
 91. Tina Silver
 92. Umar Gold
 93. Victor Bronze
 94. Wendy Copper
 95. Xavier Iron
 96. Yara Steel
 97. Zoe Tin
 98. Adam Lead
 99. Eve Zinc
 100. Frank Nickel
 101. Grace Platinum
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 103. Ivy Gold
 104. Jack Bronze
 105. Karen Copper
 106. Leo Iron
 107. Mia Steel
 108. Noah Tin
 109. Olivia Lead
 110. Peter Zinc
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 126. Ivy Bronze
 127. Jack Copper
 128. Karen Iron
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 229. Tina Tin
 230. Umar Lead
 231. Victor Zinc
 232. Wendy Nickel
 233. Xavier Platinum
 234. Yara Silver
 235. Zoe Gold
 236. Adam Bronze



Term No. 67. In the Federal Court under No. 12
of 1914, North District.
March 10, 1915.

[illegible]

Dr. J. M. H. H.

[illegible]

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

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$$\frac{d^2}{dt^2} \left(\frac{1}{r} \right) = - \frac{1}{r^3} \left(\frac{dr}{dt} \right)^2 - \frac{1}{r^3} \left(\frac{d^2 r}{dt^2} \right)$$

399

Figure 1. Schematic representation of the experimental design. The subjects were divided into two groups: the control group and the experimental group. The control group was divided into two subgroups: the control group and the experimental group. The experimental group was divided into two subgroups: the control group and the experimental group. The control group was divided into two subgroups: the control group and the experimental group. The experimental group was divided into two subgroups: the control group and the experimental group.

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ful effect does not exist in such cases, and the
trial is before a jury. *See* W. v. W., 100 Ill. 2d 111,
112; W. v. W., 100 Ill. 2d 111, 112; W. v. W.,
104 Ill. 2d 111.

Coming now to the question of the validity of the
or not the contract, it is in the case of the contract to
the court the following: W. v. W., 100 Ill. 2d 111, 112; W. v. W.,
104 Ill. 2d 111. [P] to the contract in the con-
tract W. v. W., 100 Ill. 2d 111, 112; W. v. W., 104 Ill. 2d 111.

plaintiffs defendants
delivered to W. v. W., 100 Ill. 2d 111, 112; W. v. W., 104 Ill. 2d 111.
wherein the contract was made, and the contract was in
effect W. v. W., 100 Ill. 2d 111, 112; W. v. W., 104 Ill. 2d 111.
defendant, W. v. W., 100 Ill. 2d 111, 112; W. v. W., 104 Ill. 2d 111.
the contract in the contract W. v. W., 100 Ill. 2d 111, 112; W. v. W., 104 Ill. 2d 111.

defendant
" plaintiff, W. v. W., 100 Ill. 2d 111, 112; W. v. W., 104 Ill. 2d 111.
to W. v. W., 100 Ill. 2d 111, 112; W. v. W., 104 Ill. 2d 111.
in said contract, W. v. W., 100 Ill. 2d 111, 112; W. v. W., 104 Ill. 2d 111.

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the contract in the contract W. v. W., 100 Ill. 2d 111, 112; W. v. W., 104 Ill. 2d 111.

THE FIRST PART OF THE REPORT IS CONCERNED WITH THE
GENERAL SITUATION OF THE COUNTRY AND THE
POLITICAL AND ECONOMIC DEVELOPMENT OF THE
COUNTRY.

THE SECOND PART OF THE REPORT IS CONCERNED WITH THE
POLITICAL AND ECONOMIC DEVELOPMENT OF THE
COUNTRY. THE THIRD PART OF THE REPORT IS CONCERNED
WITH THE POLITICAL AND ECONOMIC DEVELOPMENT OF THE
COUNTRY.

THE FOURTH PART OF THE REPORT IS CONCERNED WITH THE
POLITICAL AND ECONOMIC DEVELOPMENT OF THE
COUNTRY. THE FIFTH PART OF THE REPORT IS CONCERNED
WITH THE POLITICAL AND ECONOMIC DEVELOPMENT OF THE
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THE SIXTH PART OF THE REPORT IS CONCERNED WITH THE
POLITICAL AND ECONOMIC DEVELOPMENT OF THE
COUNTRY. THE SEVENTH PART OF THE REPORT IS CONCERNED
WITH THE POLITICAL AND ECONOMIC DEVELOPMENT OF THE
COUNTRY.

THE EIGHTH PART OF THE REPORT IS CONCERNED WITH THE
POLITICAL AND ECONOMIC DEVELOPMENT OF THE
COUNTRY. THE NINTH PART OF THE REPORT IS CONCERNED
WITH THE POLITICAL AND ECONOMIC DEVELOPMENT OF THE
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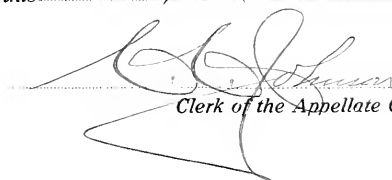
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this.....16th..... day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

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2373

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 60

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Seth Powell,

Appellee.

vs.

No. 64

March Term, 1916.

ERROR TO
APPEAL FROM

City COURT

East St. Louis COUNTY

Alton & Southern Railroad,

Appellant.

TRIAL JUDGE

HON. ROBERT H. FLANNIGAN

Term No. 64.

In the Appellate Court

35

ca. Illinois, Fourth District.

John W. ... 18.

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defendant

Plaintiff; defendant

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plaintiffs, and the defendant herein to

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1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the problem and the objectives of the research.

2. The second part of the report is a detailed description of the methods used in the study. It includes a description of the experimental design, the data collection procedures, and the statistical methods used for data analysis.

3. The third part of the report is a presentation of the results of the study. It includes a description of the data, a discussion of the findings, and a comparison of the results with previous research.

4. The fourth part of the report is a conclusion and a discussion of the implications of the study. It includes a summary of the findings, a discussion of the limitations of the study, and a discussion of the implications of the results for future research.

5. The fifth part of the report is a list of references. It includes a list of the books, articles, and other sources used in the study.

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It is not fair to say that the court
was limited to the first, second and third in-
structions. Available evidence indicates that the court in-
structed the jury in reference to the market value created by
them in determining the value of the property, and that they find
the fair market value of the property. The opinion does
not state that the jury was instructed in determining the
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

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2376

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 77

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Hummel & Needs,

Appellants

ERROR TO
APPEAL FROM

vs.

No. 72

Circuit COURT

March Term, 1916.

Crawford COUNTY

C. F. Freshwater, et al.

Appellees

TRIAL JUDGE

HON. CHARLES H. MILLER

In the 1990s, the

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Page 27

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the State courtfully examined the case. In this case, the court of the opinion that even the evidence in the record the trial court properly decided this case, and that the newly discovered no foundation for a new trial because it had

applied, "and, under that... for the contract... who testified that... police, "and, under... for a one-fourth interest... constructed by him... was built at his own expense... shares of on the part of... ville salvage co., in... were only to purchase an interest... played, and that they had no... construction of the well or the... is no evidence either oral or written... or tending to prove that... Lawrenceville salvage co., and anything... the terms of the contracts for the... furnishing of supplies, or the... contracts were all made with... first, the witness was testified on... testified that they had no conversation... witness, member of the Lawrenceville... the 17th day of April, 1914, in... assignment by... Lawrenceville salvage company for their respective... well, and that at that time the well was... in operation. There is no evidence... here by the court subject to objection... clear, redactor, it is to be applied...

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Journal of Management Inquiry 18(6)

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proving or tending to prove that [redacted], [redacted], the [redacted]
and the Lawrenceville City, Ga. [redacted] [redacted] [redacted]
their agent for the construction of [redacted], [redacted] at
Lawrenceville, Georgia, and circumstances tending to show the [redacted]
agency.

nothing to reveal as to whether or not the
journal of the trial court was destroyed.

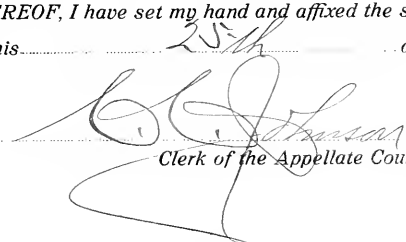
not to be included in it.

Agency.

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 25th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

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2375

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 88

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Morris Sternberger, doing business
as Empire Furniture Co.,
Appellee

ERROR TO
APPEAL FROM

vs.

No. 75
March Term, 1916.

City COURT

Anheuser-Busch Brewing Association,
Appellant

East St. Louis COUNTY

TRIAL JUDGE

HON. Robert H. Fisher

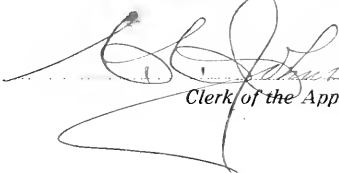
1. The first group of people who were involved in the project were the students of the school. They were the ones who were most interested in the project and they were the ones who were most involved in the project. They were the ones who were most interested in the project and they were the ones who were most involved in the project.

appellee for the purchase of said automobile, the witness is to the effect that Schraubstedter indicated to him that much there was owing to him from Schaub, and that he would take to adjust his claim; that he then caused appellee to settle his claim for \$140.00, the balance being owing to him. Appellee further testified that he called on Schraubstedter on two or three occasions with reference to paying the balance owing on said automobile, and that finally Schraubstedter came to his office and while there agreed to pay appellee \$140.00 in settlement of the balance owing on said automobile; that Schraubstedter agreed to send him a check for \$140.00 when he went back to his office and stated that on June 11, the Schaubster-Burch Co., was issued a check to appellee for the balance or money of the following week. This transaction took place on Friday, June 10. Appellee further testified that he inquired of Schraubstedter in regard to his ability to settle for said property on behalf of Schaub, and that Schraubstedter stated that he had; that he was the manager or agent for Schaub in Portland, Maine, and that such was authority to make the settlement. Appellee further testified that Schraubstedter indicated to him that he had agreed to mail and that a bill of exchange was sent to him for the amount owing on said automobile, and that he brought this bill to enforce payment of the same.

Appellee is corroborated in his testimony by his wife, Miss Koch, his bookkeeper and agent for the Schaubster-Burch Co., a person, who worked for several years at his office.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 23rd day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

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2371

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 87

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following: *and later on January 13, 1917, Opinion was modified and ordered refiled.*

Dora M. Higgin,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

No. 83

County COURT

March Term, 1916.

Madison COUNTY

Martin Keck,

Appellant

TRIAL JUDGE

HON. H. B. EATON

Welded, etc.

In the month of 1915

of 1915-16, etc.

1915-16, etc.

For 1915, etc.

For 1915, etc.

Welded, etc.

Welded, etc.

Welded, etc.

Welded, etc.

of \$100.00 and, to their present use, the same was due and payable after one year, with interest thereon, and was called to pay said note upon due, and on the 10th day of August, 1911, at the term of the Circuit Court against the estate of said deceased, and a writ of attachment in aid of said writ was issued against Alfred L. Higgins, husband of the said deceased.

The evidence in this case is as follows: On the 10th day of August, 1911, Alfred L. Higgins, deceased, died at his residence, to-wit: to-wit: to-wit: in a place known as "the farm" of the deceased, and, in his last will and testament, which was acknowledged before a Justice of the Peace in said county and was recorded in the recorder's office in said county on the 10th day of August, 1911, the said deceased did leave and bequeathed to the said Alfred L. Higgins, his wife, the sum of \$100.00, and the said Alfred L. Higgins was levied on the above described property, to-wit: the sum of \$100.00, given by the said deceased to the said Alfred L. Higgins, by statute, and a hearing was had in the Circuit Court at the trial of the rights of property, resulting in a verdict in favor of the said Alfred L. Higgins.

The evidence in this case is as follows: On the 10th day of August, 1911, Alfred L. Higgins, deceased, died at his residence, to-wit: to-wit: in a place known as "the farm" of the deceased, and, in his last will and testament, which was acknowledged before a Justice of the Peace in said county and was recorded in the recorder's office in said county on the 10th day of August, 1911, the said deceased did leave and bequeathed to the said Alfred L. Higgins, his wife, the sum of \$100.00, and the said Alfred L. Higgins was levied on the above described property, to-wit: the sum of \$100.00, given by the said deceased to the said Alfred L. Higgins, by statute, and a hearing was had in the Circuit Court at the trial of the rights of property, resulting in a verdict in favor of the said Alfred L. Higgins.

the brief and argument of April 24, 1964, in which I have had an extensive discussion on the question of the propriety of the conviction, he will say that under the holding of the Supreme Court in Appellate Court of this State, the conviction is proper. In *Harvey v. New York*, 38 Ill.2d 100, 101, 241 N.E.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898,

It was further held, in *Wright v. Carter*, 100 F. 2d 1011, 34-1 U.S. 616, 10-1, 10-2, 10-3, 10-4, 10-5, 10-6, 10-7, 10-8, 10-9, 10-10, 10-11, 10-12, 10-13, 10-14, 10-15, 10-16, 10-17, 10-18, 10-19, 10-20, 10-21, 10-22, 10-23, 10-24, 10-25, 10-26, 10-27, 10-28, 10-29, 10-30, 10-31, 10-32, 10-33, 10-34, 10-35, 10-36, 10-37, 10-38, 10-39, 10-40, 10-41, 10-42, 10-43, 10-44, 10-45, 10-46, 10-47, 10-48, 10-49, 10-50, 10-51, 10-52, 10-53, 10-54, 10-55, 10-56, 10-57, 10-58, 10-59, 10-60, 10-61, 10-62, 10-63, 10-64, 10-65, 10-66, 10-67, 10-68, 10-69, 10-70, 10-71, 10-72, 10-73, 10-74, 10-75, 10-76, 10-77, 10-78, 10-79, 10-80, 10-81, 10-82, 10-83, 10-84, 10-85, 10-86, 10-87, 10-88, 10-89, 10-90, 10-91, 10-92, 10-93, 10-94, 10-95, 10-96, 10-97, 10-98, 10-99, 10-100, 10-101, 10-102, 10-103, 10-104, 10-105, 10-106, 10-107, 10-108, 10-109, 10-110, 10-111, 10-112, 10-113, 10-114, 10-115, 10-116, 10-117, 10-118, 10-119, 10-120, 10-121, 10-122, 10-123, 10-124, 10-125, 10-126, 10-127, 10-128, 10-129, 10-130, 10-131, 10-132, 10-133, 10-134, 10-135, 10-136, 10-137, 10-138, 10-139, 10-140, 10-141, 10-142, 10-143, 10-144, 10-145, 10-146, 10-147, 10-148, 10-149, 10-150, 10-151, 10-152, 10-153, 10-154, 10-155, 10-156, 10-157, 10-158, 10-159, 10-160, 10-161, 10-162, 10-163, 10-164, 10-165, 10-166, 10-167, 10-168, 10-169, 10-170, 10-171, 10-172, 10-173, 10-174, 10-175, 10-176, 10-177, 10-178, 10-179, 10-180, 10-181, 10-182, 10-183, 10-184, 10-185, 10-186, 10-187, 10-188, 10-189, 10-190, 10-191, 10-192, 10-193, 10-194, 10-195, 10-196, 10-197, 10-198, 10-199, 10-200, 10-201, 10-202, 10-203, 10-204, 10-205, 10-206, 10-207, 10-208, 10-209, 10-210, 10-211, 10-212, 10-213, 10-214, 10-215, 10-216, 10-217, 10-218, 10-219, 10-220, 10-221, 10-222, 10-223, 10-224, 10-225, 10-226, 10-227, 10-228, 10-229, 10-230, 10-231, 10-232, 10-233, 10-234, 10-235, 10-236, 10-237, 10-238, 10-239, 10-240, 10-241, 10-242, 10-243, 10-244, 10-245, 10-246, 10-247, 10-248, 10-249, 10-250, 10-251, 10-252, 10-253, 10-254, 10-255, 10-256, 10-257, 10-258, 10-259, 10-260, 10-261, 10-262, 10-263, 10-264, 10-265, 10-266, 10-267, 10-268, 10-269, 10-270, 10-271, 10-272, 10-273, 10-274, 10-275, 10-276, 10-277, 10-278, 10-279, 10-280, 10-281, 10-282, 10-283, 10-284, 10-285, 10-286, 10-287, 10-288, 10-289, 10-290, 10-291, 10-292, 10-293, 10-294, 10-295, 10-296, 10-297, 10-298, 10-299, 10-300, 10-301, 10-302, 10-303, 10-304, 10-305, 10-306, 10-307, 10-308, 10-309, 10-310, 10-311, 10-312, 10-313, 10-314, 10-315, 10-316, 10-317, 10-318, 10-319, 10-320, 10-321, 10-322, 10-323, 10-324, 10-325, 10-326, 10-327, 10-328, 10-329, 10-330, 10-331, 10-332, 10-333, 10-334, 10-335, 10-336, 10-337, 10-338, 10-339, 10-340, 10-341, 10-342, 10-343, 10-344, 10-345, 10-346, 10-347, 10-348, 10-349, 10-350, 10-351, 10-352, 10-353, 10-354, 10-355, 10-356, 10-357, 10-358, 10-359, 10-360, 10-361, 10-362, 10-363, 10-364, 10-365, 10-366, 10-367, 10-368, 10-369, 10-370, 10-371, 10-372, 10-373, 10-374, 10-375, 10-376, 10-377, 10-378, 10-379, 10-380, 10-381, 10-382, 10-383, 10-384, 10-385, 10-386, 10-387, 10-388, 10-389, 10-390, 10-391, 10-392, 10-393, 10-394, 10-395, 10-396, 10-397, 10-398, 10-399, 10-400, 10-401, 10-402, 10-403, 10-404, 10-405, 10-406, 10-407, 10-408, 10-409, 10-410, 10-411, 10-412, 10-413, 10-414, 10-415, 10-416, 10-417, 10-418, 10-419, 10-420, 10-421, 10-422, 10-423, 10-424, 10-425, 10-426, 10-427, 10-428, 10-429, 10-430, 10-431, 10-432, 10-433, 10-434, 10-435, 10-436, 10-437, 10-438, 10-439, 10-440, 10-441, 10-442, 10-443, 10-444, 10-445, 10-446, 10-447, 10-448, 10-449, 10-450, 10-451, 10-452, 10-453, 10-454, 10-455, 10-456, 10-457, 10-458, 10-459, 10-460, 10-461, 10-462, 10-463, 10-464, 10-465, 10-466, 10-467, 10-468, 10-469, 10-470, 10-471, 10-472, 10-473, 10-474, 10-475, 10-476, 10-477, 10-478, 10-479, 10-480, 10-481, 10-482, 10-483, 10-484, 10-485, 10-486, 10-487, 10-488, 10-489, 10-490, 10-491, 10-492, 10-493, 10-494, 10-495, 10-496, 10-497, 10-498, 10-499, 10-500, 10-501, 10-502, 10-503, 10-504, 10-505, 10-506, 10-507, 10-508, 10-509, 10-510, 10-511, 10-512, 10-513, 10-514, 10-515, 10-516, 10-517, 10-518, 10-519, 10-5

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The first of these is the fact that the
economy is in a state of depression.
The second is the fact that the
government is in a state of
financial crisis.
The third is the fact that the
people are in a state of
social and political
upheaval.
The fourth is the fact that the
country is in a state of
economic and social
collapse.
The fifth is the fact that the
people are in a state of
political and social
anarchy.
The sixth is the fact that the
country is in a state of
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It is also contended by appellant that inasmuch as the growing wheat in controversy was not covered by the bill of sale in question that therefore no right thereto is shown by appellee. The evidence, however, tends to show that appellee at the time said wheat was sown was farming the premises occupied by her and her husband and that the growing wheat thereon belonged to her. At any rate the evidence on said controverted question was conflicting and we are not able to say that the finding of the jury on said issue was against the manifest weight of the evidence.

(Modification made by the Court, January 13th, A. D. 1917.)

It is also contended by appellant that inasmuch as the growing wheat in controversy was not covered by the bill of sale in question that therefore no right thereto is shown by appellee. The evidence, however, tends to show that appellee at the time said wheat was sown was farming the premises occupied by her and her husband and that the growing wheat thereon belonged to her. At any rate the evidence on said controverted question was conflicting and we are not able to say that the finding of the jury on said issue was against the manifest weight of the evidence.

(Modification made by the Court, January 13th, A. D. 1917)

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 25th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

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2387

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 97

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

LaSalle Extension University,
Plaintiff in Error.

vs.

No. 7
March Term, 1916.

John H. Stelle,
Defendant in Error.

ERROR TO
~~APPEAL FROM~~

County COURT

Hamilton COUNTY

TRIAL JUDGE

HON. JOSHUA S. SNEED

6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 84

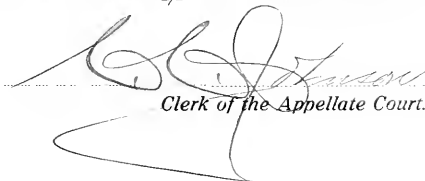
1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

6911

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 20th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

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2384

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 117

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

H. H. King,

Appellee.

~~ERROR TO~~
APPEAL FROM

vs.

No. 12.

Circuit COURT

March Term, 1916.

Pulaski COUNTY

D. W. Heilig, et al,

Appellants.

TRIAL JUDGE

HON. B. W. POPE

March 16.

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in vacation for 145.04 and costs, he makes of said rate

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15. *Journal of the American Statistical Association*, 93, 1998, 1031-1041.

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of the issues, and by the evidence, that the claimant
that the estate did not actually receive the
indebtedness but its liability, but if it was
made as contended, that the estate should be liable
for the indebtedness arising out of the estate.
made, we can see no reason why it should not be
such divergences.

The criticism made on the grounds that the
are not well taken, and that the criticism of the
instructions Nos. 3 and 5, that an attorney's fee of
any sort should be allowed. We think this is a matter
court had no right to allow attorney fees to be
not provide for attorney fees even upon the setting up
of the collection of judgment. A judgment rendered upon
upon it is not a final decree but only a preliminary
of the case, also attorney fees are not allowed until
received and are not in any way a lien on the property,
another judgment is rendered in favor of the claimant
against the insolvent, or either of them, there are
two judgments for the same indebtedness. The first
judgment rendered in this case is a final judgment
a judgment of damages contained in the complaint
and should have been filed, and by the judgment
of the judgment. The effect of the judgment is
to give the creditor a lien on the property of the
to recover. That part of the verdict that says
"that the jury find the damages for the claimant
that was necessary for the claimant to pay the
out of the judgment, and the claimant is entitled to

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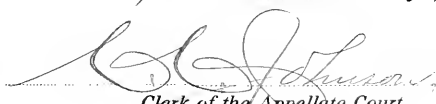
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this..... 16th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 119

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

F. E. Nulsen,
Defendant in error

ERROR TO
APPEAL FROM

vs.

No. 13

City COURT

March Term, 1916.

Terre Haute Brewing Co.,
Plaintiff in error

East St. Louis COUNTY

TRIAL JUDGE

HON. W. M. VANDEVENTER

to take the cases to the second floor, the defendant
rooms but to leave the first floor to the plaintiff.
rent for the entire building, the defendant to pay the
sum of one month's improvements. During the year 1911
defendant was in possession of the building, the first floor
and the first the defendant for which he paid the
a rental of \$68.00 per month. In furtherance of the
during the latter portion of year 1911, the defendant
pay the rent as he was obliged to and on January 1, 1912
the defendant cancelled defendant's lease of the building
agreed between them that defendant should pay the
the rents for defendant's lease which he was to pay to the
commission of three per cent. Defendant was obliged to collect
the rents until October 1, 1912, at which time the plaintiff
notified him that he had taken the building and was to
out of his hands and would employ a person to collect
collect the rents upon the premises. Defendant in compliance
tion. It further states that on the 14th of October, 1912,
defendant entered into a written agreement with the plaintiff
renting the plaintiff the room for a period of one year
period of one year ending October 1, 1913, for a sum
of \$30.00 and also for the defendant to pay the plaintiff
further agreed that on or before October 1, 1913, the
plaintiff a lease for a period of one year ending
years were paid October 1, 1913, at which time the
and signed by defendant and the plaintiff. It is further
it is further to be noted by defendant that the
defendant did not report to the plaintiff the
question to the plaintiff and the plaintiff
to the plaintiff. It is further to be noted
he supposed that the plaintiff was to be paid

2. [illegible] [illegible]

U.S. J 11 375092

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Lecherer to plaintiff that Lecherer had been told, "the manager of defendant, that he had a contract in agreement with Hansen but he did not say it had expired. He said he was some trouble in regard to it but that he would let us lease from Hansen. When I said this rent to him, I said to I paid it to him with the understanding that he would get me a lease for the property for one year from Hansen. I requested Mr. Lecherer to give me an agreement in this case. He Lecherer told me at the time that he was acting as the agent for Hansen. He told me at the same time that he could not lease that property but that Hansen was the only one that could lease it. He said he would get a lease from Hansen for us. I paid Lecherer as agent. He said he would get a lease for us from Hansen. He said at the time that he was in contact with Hansen, which had no lease and Hansen would go and get Hansen's approval. He said he would get a lease from Hansen. He said that Lecherer in fact had no right to lease the property or to do anything with it but to collect rent from the defendant. Lecherer is now claiming that he had a contract or leasing of the premises for a period of time and accept an advancement of rent. It is true that Lecherer testified that Lecherer told him that he was the agent of defendant. This, however, is denied by Hansen but if true this would not prove the authority of Lecherer. It cannot be proven by the declarations of Lecherer and this could be especially true if Hansen had no lease.

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which I had in connection with the case, and which
could not be interpreted as a statement of fact,
and no one is to be held responsible for it. The
evidence of a fabrication of the evidence, the
evidence is provided for in the following
instruction and this is a full and complete
and correct instruction. In fact, the
the true criticism is a good one, and it is
to the benefit of my country, and it is
required to be a full and complete
and there is no evidence of a fabrication
it is concluded that the instructions were not
a correct principle of law, but it is a
leading; and the criticism is a good one,
and an instruction is a good one, and it is
in fact; besides, the criticism is a good one,
the criticism is a good one, and it is a
to think that the criticism is a good one,
and it is a good one, and it is a
right to have the jury instructed upon the
criticism upon the evidence, and it is a
instructions, and it is a good one,
as the subject of the criticism, and it is
given for it, and it is a good one,
the criticism is a good one.

The jury was instructed that the
the law is a good one, and it is a
mitted to the jury, and the jury

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1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the problem and the objectives of the research.

2. The second part of the report is a detailed description of the methods used in the study. It includes a discussion of the experimental design, the data collection procedures, and the statistical analysis techniques.

3. The third part of the report is a presentation of the results of the study. It includes a discussion of the findings and their implications for the field of research.

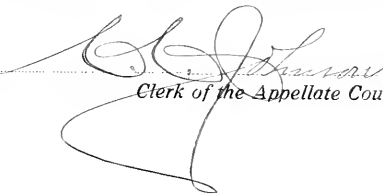
4. The fourth part of the report is a conclusion and a discussion of the limitations of the study. It also includes a list of references and a list of figures and tables.

5. The fifth part of the report is a list of references.

6. The sixth part of the report is a list of figures and tables.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 23rd day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

- Hon. James C. McBride, Presiding Justice.
- Hon. Franklin H. Boggs, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 126

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Jim Volin,

Appellee

vs.

No. 18

March Term, 1916.

St. Louis & O'Fallon Coal Co.,

Appellant

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW



John D. Lee, Plaintiff, vs. The State of Illinois, Defendant.

John D. Lee, Plaintiff, vs. The State of Illinois, Defendant.

Findings of Fact.

The defendant was a man of good character and excellent for his position, and was to be rewarded by this court.

It appears from the record in this case that the appellant was engaged in the business of a coal merchant in St. Clair County, Illinois, and was known to the court that it had allowed him to receive the same under the conditions.

The appellant began work for the defendant about two years prior to the injury he sustained. At the time of the injury he was working in the room No. 1 in the building known as the "B" building, which was a coal merchant's office. The appellant was engaged in the business of a coal merchant and was known to the court that it had allowed him to receive the same under the conditions.

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that within five or six feet of the walling, there would adhere to the roof so that very few could be in the room. In fact none, since there were no steps or slats within a few feet of the floor of the room. Of coal in this room was about seven feet long, from the evidence that on April 15, 1910, the manager and his buddy were engaged at work in this room, they having trouble with the slats falling, and it was necessary to keep the slats to save the coal. The manager, and on this day, which was the last day that the mine worked, before the day that the mine was closed, the manager of a collier was in the mine, and while there the manager and his buddy were engaged at work, and the manager saw slats to be used in the room, and that was the time the manager called their attention to the fact that they had slats in the room and they noticed that they were too short. He thereupon ordered them to cut them from six and half feet to about seven feet long. He then took the slats out from the room, and floor and determined that it would be six feet long, length of seven and one half feet long, and he promised to send them in some more of the same length. The testimony of a collier that he had seen the slats out in to the entry, and that the slats were six and half feet long, and the manager ordered him to take them and the half feet long, and loaded them in to the room, and to take them into the collier's room.

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on the 14th but on the 15th of April 1912, and his buddy undertook to set a prop under the slate and claimed that the prop was too short and that it was necessary to put a cap piece on top of the prop to give it a sufficient length to secure the roof and that while engaged in knocking said projection or nail down the slate, for the purpose of placing a cap piece on the prop, the slate gave way and fell upon the appellee and injured him. The evidence introduced on behalf of the appellee tends to show that the mine manager did not furnish the seven and one-half foot props and that the driver did not bring them into the room as claimed by appellant.

The declaration in this case contains a but and count, in which it is charged that appellee employed long props of the mine manager and that the defense negligently failed and omitted to furnish such long props as demanded and as were required. Also charges that such props were needed to prop the roof and that by reason of the failure to furnish such props the appellee was injured.

Several experts have been called by appellee but only three have been impleaded. The direct question of counsel for appellant is upon the question of existing props. It is admitted by counsel that on the 14th of April 1912 and for long afterwards a number of long props were in this room, which is a fact clearly shown by the evidence. April 15th. That there were a number of long props in the room but none of the of sufficient length to support the slate, and the vice manager admitted that all the props were

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riated through either, a ball came or finger- and
side holds the bone in place. And he says it is still
a fracture and that the fingers are stiff and clenched
and that he can close the hand about half way in the
but that he never can close his fingers that is, he is
thing tight. The doctor also says, "I found other in-
juries near the hip on the left side. The iliofemoral vein
was fractured. Primary exsanguination and amputation as a
physician and surgeon that injury to his side, the hip, is
permanent". The a police also testified to his injuries
and that he was unable to do any work and had been for sev-
eral months. The physician for police showed an x-ray
picture of the hand and claimed that it showed the fracture.
There were other doctors, witnesses for appellant, who say
that they were not able to see from this x-ray picture any
injury to the bones of the fingers. Witness for appel-
lant testified that up since he had no complaint of the injury
to his hip at the time he was hurt and that he walked from
the place of his injury to his home, a distance of about
two miles. That he failed and tried to try and close his
hand. The police says he endeavored to use his hand and
unable to do so. If the hand and hip or either were in-
jured as the testimony of the appellee and his witnesses
show them to have been injured, and he is at the time doing
work as claimed, he cannot say that the verdict is con-
cessive. In connection with his point one error, he
have argued that the irreducibility of this verdict was

brought about by the cross-examination of [redacted] appellant's witnesses, who had testified that [redacted] four reports and it was for that reason that [redacted] appellee at the time he was injured. [redacted] by counsel for appellant he was asked with [redacted] whom these reports were for and he testified, [redacted] Dr. Johnson, one to the main office and one to [redacted] know there is a copy that goes to the state and cities. Then upon cross-examination counsel for appellee asked the following question, "Also is Dr. Johnson a [redacted] a report [redacted] He is the insurance man." In this case [redacted] appellant objected and the objection was sustained, [redacted] it is insisted that because it was developed [redacted] examination that Johnson was an insurance agent [redacted] highly prejudicial to the appellant and this caused an excessive verdict to be rendered. The court [redacted] sustained the objection to the answer as to Dr. Johnson being an insurance agent. It appears from the [redacted] and the [redacted] doctor Lucy was on the witness stand [redacted] testified to the injuries of appellee and was the first physician [redacted] attended appellee. On cross-examination [redacted] he xxx told some one connected with the hospital [redacted] what he knew about the case and then said that [redacted] was the one that [redacted] Dr. Johnson about the case. He was unable to [redacted] error to permit counsel for [redacted] doctor [redacted] talked about this injury. It is said [redacted] that at the time counsel for [redacted]

questions if doctor say that they are released by
representative of an insurance company. There is
in the record showing that to be a fact and counsel
police deny such knowledge but say they subpoenaed a
special investigator for the appellant, but they can
facts say be about this we cannot say that there is an
error in this as to require a reversal of this case. We
do not believe that the point made by counsel is that
that the jury were induced by this state of evidence
excessive verdict, was well taken, as we have here before
seen that under the evidence the verdict was not excessive.

It is next argued by counsel for appellant that
the court erred in admitting the certified copy of the record
filed by appellant with the Industrial Board. It is claimed
not to operate under the compensation law. It is claimed
that the certificate of the clerk of that board is not suffi-
cient for want of a proper certificate of the clerk. It is
said that it fails to state that he hereby certifies that he
is custodian and keeper of the files, records, etc., of the
Industrial Board, and that under Section 1, Chapter 53,
which provides "The certificate of any clerk, treasurer, city,
village, town, county, or secretary, clerk, treasurer,
or other keeper of any such office, or other public office,
ordinances shall contain a statement that he is the
keeper of the same, and if there is a statement that he is
The certificate complies with the requirements of the
secretary of the Industrial Board. It is claimed that

questioned the right of the
 representative to call in
 in the record of the
 justice and the
 special interest
 in the record of the
 in the record of the
 do not believe that
 that the jury
 excessive verdict
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we can see no reason why witnesses should be required to testify as to the contents of a notice that has been posted. The mode of proof adopted in this case is not inconsistent with the mode of proof adopted in the case of the election act was approved in the case of *State v. Lundy*, 101 Conn. 125, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

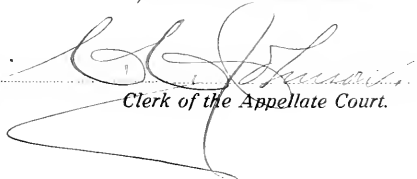
We cannot say in this case that the verdict of the jury was manifestly against the weight of the evidence, or that there was any substantial error committed by the court in the trial of the case, and the judgment of the court is affirmed.

WILLIAM H. HARRIS

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this.....18th..... day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

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2388

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

2037.1.127

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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| Clemeth January, | } | ERROR TO
APPEAL FROM |
| Appellee | | |
| vs. | | |
| No. 22 | | |
| March Term, 1916. | | |
| Metropolitan Life Insurance Co. | | |
| Appellant | | |
| | | |
| | | |
| | | |
| | Circuit | COURT |
| | St. Clair | COUNTY |

TRIAL JUDGE

HON. GEORGE A. CROW



Term 1912. In the 1st District, 1st
Fourth District.
March 11, 1912.

Clemeth January,
vs. Metropolitan Life Insurance
Company,
Appellant.

Amended Petition for
Reconsideration of
the Judgment of the
Appellate Court.

Revised, 1912.

The appellee recovered a judgment in the
lower court in the case of 1912, and the
to reverse which this appeal is prosecuted.

It appears from the record and the evidence
the appellee has failed to file any brief in this case,
required by the rules of this court.

It is therefore ordered that the judgment of the
lower court be reversed and the same be affirmed by the
under rule 27.

The judgment of the lower court is hereby
case remanded.

Not to be reported in 1912.

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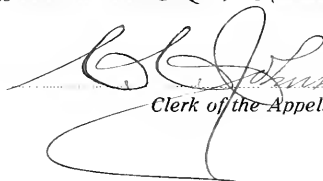
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

*IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 23rd day of November,
A. D. 1916.*


Clerk of the Appellate Court.

OPINION

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2387

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 128

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Mattie Anderson, Admr., etc.,

Appellee

ERROR TO
APPEAL FROM

vs.

No. 28

March Term, 1916.

Circuit COURT

Hiram Chittick,

Appellant

Pulaski COUNTY

TRIAL JUDGE

HON. BENJAMIN W. POPE

twenty-six three thousandths part of said land and a
said decree was entered and the said decree was
to be- undere the land of such partition sale. It
appears that he had said a considerable sum to the
one of the heirs for their interest in their share of
a small portion of this land to be sold to him. It
appears that when the said decree was called
this officer that she was willing to pay the full amount
for the amount of money that he had expended in protecting
his title, and as to the said decree, the witness
stated that he had said that he had spent more or less
than the balance of the said decree, he was willing
to release the mortgage. The said decree, then, the decree
and delivered to the officer of the court and the officer
and a read therein to the said officer of the court.
release was acknowledged before the officer of the court.
An attempt was made at the time, in the presence of the
witness of one of the witnesses, to deliver the said decree
closure but for some reason was not accomplished and
after the said decree was delivered to the officer of the court
appellant for the full amount of the said mortgage of
said mortgage. It is to be noted that the said
appeal is prosecuted.

The said officer of the court has been asked to
miss this appeal for two reasons: first, that the
"That the evidence was not sufficient to sustain the
Verdict, taken under the instructions of the court."

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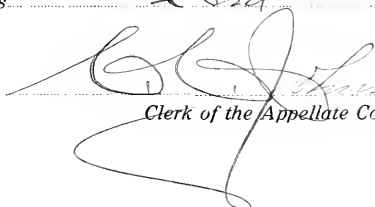
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 23rd day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

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2371

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 129

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

R - g d - 137 (4-6-17)

Iva Dallas,
Appellee.

ERROR TO
APPEAL FROM

vs.
No. 32.
March Term, 1916.

Circuit COURT

East St. Louis and Suburban Rail-
way Company,
Appellant.

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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juvenile *Ch. obscura*. The *Ch. obscura* larvae were reared on a diet of *Ch. obscura* pupae.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th day of November, A. D. 1916.

Charles C. Johnson,
Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 130

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Denison-Gholson Dry Goods Co.,

et al., etc.,

Appellant.

vs.

No. 36.

March Term, 1916.

R. F. Martin, etc.,

Appellee.

ERROR TO
APPEAL FROM

Circuit COURT

Franklin COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON

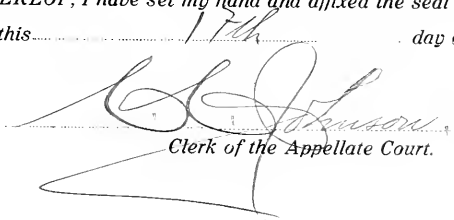






I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 17th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 131

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Knights of Pythias, etc.,

Appellant

ERROR TO
APPEAL FROM

vs.

No. 37

City COURT

March Term, 1916.

East St. Louis COUNTY

Annie Davis,

Appellee

TRIAL JUDGE

HON. M. R. SULLIVAN

Term No. 37.

In the Appellate Court,

Fourth District.

March Term A. D. 1910.

Knights of Pythias I. O. O. F. . . . }

A. O. U. W., Grand Jurisdiction . . . }

of Illinois,

Appellant.

vs.

Annie Davis,

Appellee.

Lorring, J.

The appellee recovered a judgment for the amount of three hundred dollars, to which this appeal is prosecuted.

It appears from the record in this case that appellant is a fraternal organization with lodges throughout the state and under its charter is engaged in issuing beneficiary certificates to each of its members, insuring their lives upon conditions prescribed in its constitution and by-laws. One of the ordinary lodges of this organization had been instituted at Rockford, Illinois, and held its regular meetings at that place. The husband of appellee, Joseph Davis, was a member of the Rockford lodge. In July 1908, whenever a person becomes a member of the Rockford lodge, he becomes also a member of the beneficiary association.

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U.S. DEPARTMENT OF COMMERCE

1. The first step is to identify the problem or question that needs to be answered.

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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of no lodge has been made of this day at least the day of the first quarterly report of said lodge of the organization". Article 7, Section 4, provides, "When being charged in the knight rank each member shall pay to the keeper of records and seal twenty-five cents his beneficiary certificate; he shall also pay to the master of finance for each full month of that quarter one dollar for the ensuing quarter in the beneficiary department. Each lodge shall pay to the department one dollar for every new member, at the time of forwarding his certificate, one dollar for his membership fee in the department. It is the duty of each knight to pay into his beneficiary department through his lodge one dollar quarterly and in advance, and it is the duty of the master of finance to collect the same in common with other dues". Article 7, Section 5, provides that if death occurs within six calendar months after date of being charged in the knight rank twenty-five dollars shall be payable; between six and twelve months, fifty dollars; between twelve and eighteen months, seventy-five dollars; between eighteen and twenty-four months, one hundred dollars; between twenty-four and thirty months, one hundred twenty-five dollars; between thirty to thirty-six months, one hundred fifty dollars; between thirty-six and forty-two months, one hundred seventy-five dollars; between forty-two and forty-eight months, two hundred dollars; between forty-eight and fifty-four months, two hundred twenty-five dollars; between fifty-four and sixty months,

of new judges for the day of the first day of the organization. It is to be charged in the name of the keeper of records and his beneficiary, and the master of finance for each dollar for the entire month. Each dollar shall be every new member, at the one dollar for the is the duty of the through his legal it is the duty of the in common of that it is of being charged in the shall be payable; between dollars; between dollars; between hundred dollars; between hundred twenty-five dollars; between forty-two and forty-two between twenty-five

two hundred fifty dollars, and beyond sixty dollars all hundred dollars. "This section shall apply to all only after filing their report and paying the quarterly beneficiary tax.

Article 11, Section 20, provides, "Any member who is unfinancial in the department of the Grand Lodge in the jurisdiction of Illinois shall be expelled from the lodge in all and not entitled to any benefits until paid.

Article 11, Section 7, provides, "Any member who shall permit himself to become non-beneficial shall forfeit his right to be reinstated from the beneficiary department and shall be expelled from the lodge and shall be ineligible to be re-instated in the beneficiary department at any time before suspension from his lodge by paying the full amount of his arrearages, and when reinstated by his lodge shall furnish satisfactory proof of his good health..... In no case shall the master of lodge receive from the non-beneficial member less than the full amount due." Article 11, Section 8, provides "Any member who shall permit himself to become non-beneficial when re-instated within thirty days his certificate shall again be in full force and effect, otherwise he shall be subject to Article 7 of Article 7 of the beneficiary for the same as a non-beneficial member and shall lose the benefit of his full time policy and be required, for the purpose of fixing the amount due, to file his certificate, as start in at the beginning of the first six months period of the policy, and shall be ineligible

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himself within thirty days. Provided, that if a member shall have been once in continuous standing for five years during continuous membership, or during suspension, and thereafter shall become non-beneficial, he shall remain so for more than thirty days, he shall not be subject to Section 9 of Article 7, governing the amount of his certificate for the first five years of continuous standing, but his certificate shall have value thereof as follows: if death occurs within one year after his first re-instatement in the Beneficiary Department, his certificate shall be payable; if between one and two years one hundred eighty dollars; if between two and three years two hundred ten dollars; if between three and four years two hundred forty dollars; if between four and five years, two hundred seventy dollars; if after five years, the certificate shall then be again of full value. It is also provided that this section shall apply only to members after they shall have been once in continuous standing for five years. Any members suspended from the lodge applying for re-instatement shall be regarded for this purpose as a new member.

It further appears from the evidence that on October 1, 1914, Davis paid over \$2.50 and his name was placed on the non-beneficial list and so reported to the Grand officers and that on January 1, 1915, he was still in arrears to the amount of \$5.75 and the quarterly reports were made on October 1st and January 1st. Upon January 1,

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1915, Davis paid the total amount of \$9.75, and he died on March 17, 1915.

It is contended by the appellant that Davis was only entitled to recover \$9.75 under this certificate, and that it made her a tenant thereof. It is also claimed that Davis was in arrears and non-beneficial from October 1, 1914, until January 7, 1915, and it also seems to be conceded that Davis had been in continuous good standing for fully five years prior to October 1, 1914. It is insisted by counsel for appellee that Davis is entitled to recover three hundred dollars, the full amount of benefit allowed under the certificate, and that the fact that Davis was in arrears and non-beneficial on October 1, 1914, and on January 1, 1915 would not deprive her of the full benefit of her certificate because, as it is claimed, it had been a custom in the lodge to make payments from time to time, and after the period fixed for such payments, that they had been accepted by the officers of the subordinate and grand lodge and therefore the payments under the by-laws were waived, and this is the real question in this case. The record does disclose that payments were made from time to time and the Supreme Court of this State, as well as this court, have held that under such circumstances a jury would be warranted in finding that a waiver had been made and would prevent the loss of the beneficiary fund. His ruling should have no application in this case for the reason that the by-laws of the appellant provide that even after there has been a default and non-

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has become non-beneficial that they may be entered upon their certificate. Section 7 of Article 1, reads: "Any member who permits himself to become non-beneficial shall ipso facto stand suspended from the beneficiary department and his certificate shall thereupon become null and void; however, such member may be re-instated in the beneficiary department at any time before suspension from his lodge by paying the full amount of his arrears, and so that even if a member is in arrears he is permitted, under these by-laws, to pay these arrears for the purpose of preventing himself from being suspended from the lodge, and for the further purpose of giving him a standing as provided for in the by-laws, and the time of payment is important in determining the amount due the beneficiary. If he pays up within thirty days he is restored to his full standing without effecting the value of his certificate. But if he pays up after the expiration of the thirty days then under these by-laws, as we read them, the value of his certificate is affected.

The court, at the conclusion of the trial, gave to appellee an instruction that if he is "was never suspended or expelled for non-payment of assessments or dues, as prescribed by the by-laws, but was permitted and allowed to pay his assessments and dues to the subordinate lodge at times other than prescribed by the by-laws, and if the jury believe from the evidence that Joseph ... did pay his assessments and dues at times other than prescribed by the by-laws, and was never suspended or expelled and con-

tinued in good standing in his old lodge, then such action of the subordinate lodge in allowing him or to pay his dues and assessments at times other than prescribed by the by-laws constitute a waiver and the defendant grand lodge and beneficiary department thereof are bound by such action of the subordinate lodge". We are inclined to agree with the contention of counsel for appellant that this instruction was misleading and otherwise incorrect, for even if Davis did pay his assessments and dues at other times than when they became due this was permissible under the by-laws but did not, as we view it, necessarily constitute a waiver of the right of appellant to insist upon the proper amount of such payments when so permitted, as prescribed by the by-laws, and one might well infer from this instruction given, that the mere payment of these assessments and dues after the time would be a waiver of the right of appellant to insist upon limiting the amount to the sum prescribed by the by-laws. We cannot agree with the contention of counsel for appellant that the appellee is limited to the amount of twenty-five dollars as it is not disputed that Davis had been in continuous good standing for over five years, and that being true, and Davis having died in one year after his last re-instatement, then under Article 8 of Article 8 appellee was certainly entitled to the twenty-five dollars as beneficiary in the certificate.

We are of the opinion that the court should have reversed the instruction for the reasons above stated, and is reversing judgment against appellant for the amount of three hundred

dred dollars, and the judgment of the lower court is reversed and the cause remanded, unless the appellant files a remittitur of one hundred and fifty dollars, and if such remittitur is so filed the judgment will be affirmed and in case of such affirmance the costs of this Court shall be divided equally between the parties.

(3)

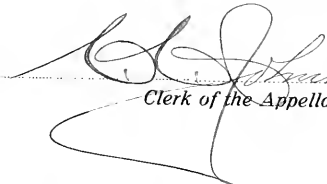
Not to be reported in full.

three million, and a half, and the
revenue of the country is about
within twenty per cent of the
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in case of such a war, the
be divided equally between the two.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 20th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

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237

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 133

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

George H. Pritchett,

Appellant

ERROR TO
APPEAL FROM

vs.

No. 43

County COURT

March Term, 1916.

Williamson COUNTY

George Griffin,

Appellee

TRIAL JUDGE

HON. W. F. SLATER

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years, was engaged in the real estate business and was a resident of the community all of his life. Griffin was anxious to dispose of his stock of groceries and he told Writchett that he desired to sell or trade the same. In the fall of 1915, Writchett had offered to trade some farm property to Griffin for his stock of groceries but was unable to do so but told Griffin he thought he could get him a trade for some land. Hereafter, Writchett proposed to trade Griffin the above described tract of land for his stock of groceries, horse, buggy and harness to the hundred dollar difference. It appears that neither Writchett or Griffin had ever seen the land in question. In 1914, the principal agent had been the land for sale and had given to Writchett a written statement as to the character of the land in which he described the land as follows, "this eighty acres is crossed lengthwise by a branch, twelve to fifteen acres creek bottom. The land cultivated, more can be added. Balance hill side, with considerable good timber and partly good cultivated land, good soil". This was shown to Griffin by Writchett and Writchett said to him that he had always found that so in his statements and that he would guarantee that he would find the land as good or better than that he had stated. Thereupon an agreement was entered into. Writchett's wife had had some trouble and Griffin wanted to see the land conveyed to his son-in-law. Writchett, and Writchett called a part of the trade to purchase the stock of groceries and in taking out the papers the contract for the land was

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Witchett ...
fall of 1911, ...
property to ...
able to do ...
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of the land was given to us to acquire the land to be conveyed to us on the bill of sale and the bill of sale was made to . . . all. It was understood and agreed before this time should be consummated it was to be by Lone and Gore was to sign the agreement. Whitsett forwarded the agreement and bill of sale to all and at the time sent his notes payable to sell for \$500. . . to send the money to Lone to be credited and they were to be returned to Whitsett for delivery to Griffin. When the papers were in transit to Lone, Griffin went out and examined the land in question and found that it was not as had been represented and claimed that it was full of hills and Mount Shous and of no value. He immediately went concerning this fact and before the papers had been returned by Lone, Griffin told Whitsett that he not proceed any further with the contract, that he would not make the deal because the land was not as represented. Whitsett claimed that at the time the papers were signed by Griffin he entered into an arrangement with Griffin whereby Griffin was to hold possession of the stock of land for him, keep account of the sales and that Whitsett was to pay him one dollar per day but this is denied by Griffin. After the papers were returned by Lone to Whitsett, he demanded possession of the stock of land for himself upon Griffin's refusal to deliver the same he brought an action of replevin.

To the declaration filed the defendant pleaded the defense of non assent non est inquit and promissory estoppel. The cause was tried by a jury and the jury found

[illegible]

and judgment for the evidence.

The first contention is that the contract was executed and the title to the property was delivered. As above stated, at the time the agreement was made, it was agreed that before the deed could be delivered, it was necessary to have the consent of the owner of the land, and to have his signature to the contract. By his son-in-law, J. W. Griffin, signed the contract and delivered it to Ritchett to secure the signature of the owner. The evidence tends to show that Ritchett secured the signature of the owner, and that it was necessary to have something tangible to be done in order for him to get what the parties agreed upon, and for that reason he signed the bill of sale was signed and given to Ritchett. Before the contract was returned Griffin discovered that a part of the property was false representations as to the character of the land, and refused to complete the trade so that before the property was finally completed and a deed and delivery of the property was made, Griffin had refused to proceed further with it, and was not consent to a delivery of the property. At that time he had not signed the agreement and there was nothing to bind him to bind him, and Griffin could not be bound by the agreement until he was also was bound by the agreement. In view of it, the title did not pass to him or his agent, and the contract could not be binding on him. Griffin had executed and delivered the contract of sale, and the agreement. It is claimed by Ritchett that he had agreed that he would hold possession of the property for him, and on account of the policy of the law, and the fact that

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Griffin one of the buyers for the services, and that he had any such arrangement and that he had no other choice, "I would stay on and wait until everything was shaped up". We think that this was once the jury was warranted in finding that the title had not passed out of Griffin.

The next point insisted upon is that the defendant was acting for a disclosed principal and that he was in good faith and in good faith purchased the goods of the defendant of Cone, and as an innocent purchaser should be protected as to the note that he had given to sell for the goods of groceries. We are unable to see that he stood in the position of an innocent purchaser. We knew the facts of the contract and knew that a consideration of the fact that the acceptance by Cone, and knew also that if Griffin came to withdraw his proposition before Cone had accepted, no agreement could not be enforced. We also knew that the agent of Cone, had made certain representations with reference to this land and Mitchell had guaranteed that those representations were true and we must have known that if Griffin covered the representations were untrue before Cone accepted the contract that Griffin could refuse to proceed further with the deal. It is also insisted in this case that before Griffin could refuse to proceed with the contract that he would have to place Mitchell in the position or in other words, cause the note that Mitchell had given to be surrendered to Mitchell. This is not tenable.

Christian one of the boys of the family
that he had only one son
Christian, "I would stay
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warranted in finding that the
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The next point mentioned was
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or in other words, and as a
be supposed to be right.

was under no obligation to write it in. It is a matter of fact in so far as it relates to the facts of the case. It is a fact.

The next contention is that the verdict was against the law in the evidence. It is a matter of much dispute as to the evidence in this case. The written representation made by Hill is not denied and it is a fact that a short time previous he examined the land. He looked at it and thought that the statement he made of it was a correct description of the character of the land. The evidence tends to show that there was not more than half an acre of the land represented and that only a small part of it was cultivated. That the rest of the land was hilly, rocky, inclined to be mountainous and that there was a valuable timber upon the land. That all the timber consisted of a coarse scrubby oak and elm and that the land had no substantial value. While Hill says that he thought the land was a fair one it says as upon cross-examination that he had been loaning money upon lands in the vicinity in which the land is located and that it was a mountainous district; that one time he loaned J. H. Jones's father money upon the land and upon cross-examination he says, "I was loaned the J. H. Smith land (being the land in question) and I loaned to J. H. Jones he is the father of J. H. Jones who is deceased. I was deceived in the first place and I loaned eighty acre tract by Nathan Jones and I loaned to J. H. Jones and they stuck me. I didn't know the land was so poor. The land was so poor. It appears to me that there is no sufficient evidence in this record to warrant the jury in only

Conceding

Verdict was given in 1882

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in finding that there were false representations made with reference to the character of the land and that Griffin knew it and that they were made by him for the purpose of deceiving any prospective purchaser and that Griffin did not know the character of the land and that the land was properly misrepresented. As we understand the law, if Griffin ascertained that he had been imposed upon by fraudulent representations before a final consummation of the deal, Griffin would have a right to refuse to proceed further. Even if he had not, his agent did not know that the representations were false, that could be no protection to them under the circumstances in this case, as the evidence shows that the representations were false and the consequences were the same to Griffin whether they knew of the falsity or not. "And in relation to representation it is immaterial whether he knows it to be false or not for the consequences are the same to the vendee. If he relies on the truth of the declaration, he is equally imposed on and injured, and ought to have recourse to the one who has been the cause of the injury". *Wise et al. vs. McDougall*, 68 Ill. 498; *Hill vs. Holt et al.*, 12 App., 218.

It is next claimed that the court erred in admitting evidence in behalf of defendant which included a description as to the character of the land not included in the Hall representation. We can see no reason why the witnesses should not have been permitted to give, as they did, a full description of the character of the land so that the jury could determine whether or not there had been a false representation.

Objection is made to instructions 13, 14, 15, 16, and 4 given on behalf of defendant; that they will be the effect of placing the plaintiff in a false position. The court said:

in finding that there were no other persons
reference to the character of the person
it and that they were not in the
ceiving any prospective notice of the
know the character of the person
misrepresented. As we understand the
tained that he had been in the
tations before a final completion of the
had a right to refuse to proceed further
his agent did not know that a person
that could be no protection
in this case, as the evidence
were false and the consequences were
whether they knew of the falsity or not
representation is in the nature of a
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vened. If he relies on the character of the
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et al. vs. DeGoggin, 100 N. H. 100, 101
App., 218.

It is next claimed that the evidence
evidence in behalf of defendant which
tion as to the character of the person
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then that the statements and representations as to the character of the land were urged in the subsequent trial and that the principal error could be regarded to be such statements. But these objections are all disposed of by the foregoing opinion and the numerous criticisms taken to the instructions are without merit.

We have also examined the trial and the objections complained of and so far as we are able to see, or that any objections have been pointed out, the instructions were properly refused for reasons as above set forth in this opinion.

There were some other objections urged that were of a minor character and unimportant and could not in any way work a reversal of this case.

After a careful consideration of all of the facts and circumstances shown by the record in this case we are of the opinion that the jury was warranted in finding the issues for the defendant and can not say that the verdict was manifestly against the weight of the evidence, or that the court committed any reversible error in its proceedings in this case. We believe that the verdict is right, that substantial justice has been done between the parties and that the judgment of the lower court should be affirmed. The judgment is affirmed.

JUDICIAL DEPARTMENT

Not to be reported in full.

them first the elements and components in the
character of the bond were applied to the
and that the principal of the bond was
such statement. A full and complete
disposed of by the foreign origin and
criticism taken to the instructions
have also examined the instructions
tions contained in and so far as the
that any objections have been raised
were properly refused for reasons in connection
this opinion.

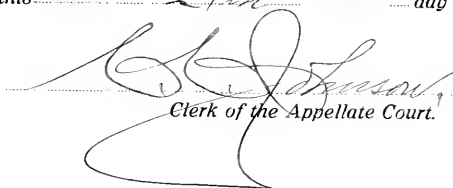
There were some other objections to the evidence, but they were all overruled. The court then proceeded to the merits of the case. It found that the defendant had committed the crime charged, and that the evidence was sufficient to support the verdict. The court then sentenced the defendant to the term of years and a fine. The court then adjourned until the next day.

[illegible]

Not to be removed from file.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 24th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

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2375

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 142

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

| | | |
|--------------------------------|---|----------------|
| John D. Halladay, | } | Circuit COURT |
| Appellee | | |
| vs. | | |
| No. 47 | | |
| March Term, 1916. | | |
| Murphysboro Supply Co., et al. | } | Jackson COUNTY |
| Appellants. | | |

ERROR TO
APPEAL FROM

TRIAL JUDGE

HON. D. T. HARTWELL



Dec. No. 47. In the Appellate Court of the State of Illinois,
North District.
Each Term, 1916.

John A. Halladay,
Appellee,

vs.

Murphyboro Supply Co.,
Applicant; Merchants' Trust Co.,
Thomas John and Henry Mitchell,
Appellants.

Tweddie, J.

The appellee recovered a judgment against the appellants in the circuit court of Jackson county, Illinois, for the amount of Fifteen hundred (1500.00) dollars, to which this appeal is prosecuted.

It appears from the record in this case that on the evening of September 19, 1914, Thomas Halladay, who lives at Altoona, boarded a freight train at about eight o'clock P. M. on the I. C. R. railroad and went to Murphyboro, a distance of about sixteen miles, and arrived there at about ten o'clock P. M. He was in company with a young man by the name of Collie Norton, and also with Bob Gregory. Upon their arrival at Murphyboro, Dave and Bob Gregory and Tom Halladay went into the saloon of Thomas John, one of the appellants, and known as the "Loyalist Bar," and there drank a bottle of beer with the Gregory boys, and later on invited Frank Tweddie to join him in a drink, and thereafter went

to the liquor store of the Murphysboro Supply Company, at which place, the evidence tends to show, he purchased a bottle of brandy, and later on he returned to the place of Thomas John on there drank another bottle of brandy. While the proprietors and clerks of the defendants say that they have no knowledge of having sold Thomas Halladay any beer or liquor, or of his having drunk any beer in their places of business, they do not deny but what he did obtain beer and liquor at their places of business.

The evidence further tends to show that on the morning Murphysboro, Thomas Halladay was considerably intoxicated, so much so that several witnesses say, that at about eleven o'clock and while at the depot waiting for a freight train to return to Alton, that he was cutting up and staggering around and seemed to be pretty drunk. At about eleven o'clock or a little after a freight train passed through Murphysboro going to Alton, and Thomas Halladay with others boarded this train while it was standing at the twelve to twenty miles an hour, and climbed up on the top of the freight cars, and as Thomas Halladay was walking along the top of the freight cars he attempted to step from one car on to another, and in making the step lost his balance, fell between the cars and was killed. At the time he was picked up there was found upon his person the bottle of whiskey and a broken glass of another bottle that had contained whiskey. Thomas Halladay was the age of twenty-five years and six months, and weighed about 118 pounds, and was five feet seven inches high. The evidence shows that

to have been a rather industrious boy and willing to work, and that he helped his father very materially in the blacksmith shop and that his services when at work were valued at the value of about two dollars a day; and that when not engaged to work at the farm he was a delivery stable for which he received five dollars a week.

This suit was instituted by the father and mother of Thomas Halladay, but on the close of the testimony evidence, the mother was dismissed out of the case and it was conducted in the name of the father, John L. Halladay. The declaration charges that the defendant, Murphy's Lumber Supply Company, a corporation, an Illinois corporation, engaged in the saloon business and conducting same at Murphysboro, Illinois, soliciting the business and making the order of Executive Article referred to the father and charges that on September 1, 1911, the defendant, from shop keepers, sold and gave intoxicating liquor to Thomas Halladay and then and there caused him to become intoxicated, and that in consequence of such intoxication he fell between the cars of a certain train of the Mobile and Ohio Railroad Company and was then and there killed; and then charges that by reason of the previous acts of the defendant were injured in their means of support. To this declaration the defendant filed a plea of not guilty. The case was heard by a jury and a verdict rendered for the plaintiff in the amount of two thousand dollars; upon a motion for a new trial the court required a contribution of five hundred dollars, which was made, and a judgment of new trial entered.

There has been no change in the status of the case since the last report was made.

hundred dollars.

Counsel for appellants have assigned several errors and we will only attempt to pass upon such of them as have been argued and will follow the order in which these errors were presented as far as we can. The first objection urged is that the court erred in permitting counsel for appellee to ask the witness Cassie Wade this question: - "You would not say positively you did not sell liquor to a minor or later back to a minor on the night of September 12, 1914?" This witness ^{had} testified in his examination in chief that he had been instructed by the proprietor not to sell any liquor to minors; that he did not know Thomas Halladay; that he did not remember of selling to anyone answering the description of Halladay; and that he did not sell to anyone that night that looked like a minor to him. The purpose of this examination in chief was to relieve the appellant of any damages consequent upon knowingly selling to a minor as Halladay had been proven to be, and the asking of this question upon cross examination was proper in order to other purpose than to ascertain whether or not the instructions testified to as having been given, were given and being carried out in good faith; after the answers had been given drawn out in chief, we can see no objection to this question upon cross examination for any proper purpose. It is also objected that the witness Robert Reither was permitted to testify that Thomas Halladay offered him whiskey and that he used to beer on him. The objection urged is that this is too remote. It may be that such testimony is not of much weight, but this

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Contrary to what we have said, we have not been
 and we will only accept it if it is not
 been argued and it follows that it is not
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does not destroy its competency and the weight of it is for the jury to determine; it was not erroneous.

The next objection urged is that the court erred in giving appellant's first instruction. This instruction is a literal copy of Section 3 of the Texas Code of Civil Procedure provided therein, and did not direct a verdict; the giving of an instruction in the language of the statute is not error. *Wheeler v. Wheeler*, 100 Ill. 574; *Donley vs. Fidelity*, 100 Ill. 586. A further objection to this instruction is that all damages would turn test sorrow, grief, etc. could be taken into consideration and thus it would permit exemplary damages without requiring the jury under what circumstances the jury damages could be awarded. It will be observed that this instruction did not direct a verdict, and appellant's instruction number 11 advised the jury as follows: "First under the law, in estimating plaintiff's damages you can only take into consideration the secondary loss, in any, which plaintiff may have sustained by reason of the loss of his means of support, if any." This instruction also advised the jury that they could take into consideration sorrow, grief, etc. in arriving at their verdict. Instruction 13 given for appellant advised the jury that even if liquors were obtained from the defendants by means of bribery, through the corrupt clerk, and from the proprietors, and that such persons had been instructed not to sell to minors, and that such sale was made in violation of the orders of the prohibition, then the jury could not under any circumstances award exemplary damages. In this case the evidence was not sufficient to justify

[illegible]

that the plaintiff had sustained some actual damages and if the liquor was sold to the deceased in violation of the statute with reference to the sale of intoxicating liquor to minors, then the appellants could not complain even if the instruction was broad enough to include exemplary damages. *Jennedy Bros. vs. Sullivan*, 54 Ill. App. 40; *Carve vs. State*, 136 Ill. 94. If the sale was made in violation of the orders of the proscriber then appellant's tenth instruction advised the jury that exemplary damages could not under any circumstances be awarded. We do not see anything in this verdict that indicates the jury intended to include exemplary damages, and taking the instructions as a series we believe that the jury was fully advised that it could only award as damages such pecuniary loss, if any, as the plaintiff had sustained.

As we understand the criticism upon appellant's third instruction, it is, that it permitted a father to recover for loss of icons of support after the deceased arrived at his majority, and the argument is that - "We submit that there is no obligation cast upon a son to support and maintain his father while under age, and even after he becomes of age unless the father becomes disabled and the son is financially able to support and maintain him; but it will be observed that this instruction does not place a right of action upon the fact that the father was entitled to the son's wages but upon the assumption of the fact that it was the duty of the son to support and maintain his father." We do not understand this instruction or the law to limit the right of recovery to the value of the son's

wages. If it appears that he contributed to the support of the plaintiff even if the relation of parent and child did not exist, and that by reason of the unlawful sale of liquor and consequent intoxication the plaintiff was injured in his means of support, then he is entitled to recover whatever loss the jury may determine to be sustained. The U. S. Brewing Co. vs. ... , 146 Ill. 131, and S. W. ... Co. vs. ... , 146 Ill. 131, ... believe that this instruction assumes that ... the duty of the deceased to contribute to the support of plaintiff, but is based upon the amount of support he ... given, and that plaintiff might reasonably expect to receive from the deceased.

Instruction number 7 ... states the doctrine that if a person by reason of intoxication is rendered reckless and careless of his own safety and ability to care for himself and is injured as a result of such intoxication, the ... right of action is given to those persons who may have sustained loss from such injury. ... no cause for criticism when this instruction ... and think this doctrine is well sustained by the case of ... vs. ... , 146 Ill. 131. The criticism upon the ... of ... instruction number 14 is not well founded; it is misleading and had no place in the trial ... is caused. It sought to advise the jury that the fact that ... of intoxicating liquors made in violation of the criminal code because of the liability of those ... could not be taken into consideration in determining the ... in this case. We cannot see how that is improper and is certainly

misleading.

Refused instruction number 13 sought to limit plaintiff's right of recovery to the value of his wages until the deceased arrived at his majority. The cost of supporting him; this is not the proper rule for allocating damages, as we have above shown, and the court is in error in refusing the instruction.

There is no fault in the criticism of the evidence. The appellee went outside the record in his argument. It is true that some of the remarks were made in order to rebut the offer of counsel for appellant, but the objection in each instance was promptly sustained by the court, and the criticism was not necessarily such an erroneous and misleading statement, as to see nothing in the remarks that are sufficient to require a reversal of this case.

It is next objected that the evidence of the sale of intoxicating liquor and of the death of the deceased is wholly insufficient to sustain the verdict of the jury and was manifestly against the weight of the evidence. The evidence tended to show that the deceased purchased the intoxicating liquor from both of the defendants; that he drank three or four glasses of beer in the afternoon of Thomas John; and procured liquor in bottles from the Murphy's Store Supply Company, and that within the hour of the time he reached Murphy's Store he was found lying on the street, having drunk liquor that he became intoxicated, and the evidence shows that he was staggering, dizzy and unconscious, and it is insisted that in stopping near the car at the time that the car on to which he was taken was the car in which he was

misleading.

Refused in a motion to dismiss.

plaintiff's right of recovery to the defendant.

until the deceased plaintiff is dead.

of supporting the plaintiff's motion.

ting damages, a new case is presented.

er in refusing the plaintiff's motion.

There is no doubt that the plaintiff's motion is well founded.

appealed from the judgment of the court.

seem that the plaintiff's motion is well founded.

discovered for a plaintiff, or an official of the plaintiff.

was properly established by the plaintiff.

not necessarily a plaintiff's motion.

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It is the plaintiff's motion.

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they and the plaintiff's motion.

The evidence tended to show that the plaintiff's motion.

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real cause of his fall was that he slipped in steering on the tin roof, the evidence of the witnesses who were present tends to show that the tin roof of the car was dry and that instead of slipping he contended he lost his balance and fell head-first between the cars. There is no way to say from the evidence that the verdict of the jury with reference to the order of motion and the intention of the deceased was manifestly against the weight of the evidence, and if the deceased was intoxicated, that is consequence of such intoxication he lost his balance and fell between the cars and he died, then the jury would have a right to say that the intoxication was the proximate cause of the death. It is well settled that where there is evidence tending to show any particular thing could be the proximate cause that the jury and the judges under such circumstances of what constitutes such proximate cause.

It is further contended by counsel for appellant that the verdict is excessive. The evidence tends to show that the deceased was a good worker and was capable of earning two dollars per day, and that he contributed most of his wages to the support of the mother and the family dependent upon him. He was a devoted husband and had a six-month-old, and that is his wife's intention, to desert say that he would not have been of this world - his actions and verdicts for such longer period. The actions were involved have been sustained by our courts on many similar reasons. It is decidedly within the province of the jury to fix upon and determine the loss sustained in such cases.

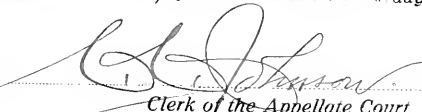
and we think it was well said in the case of Brown vs. Butler, 66 Ill. App. 91 that "In these cases it is impossible to compute the actual damage upon any definite or specific basis. The jury must determine that question as practical men upon the evidence before them and what they can, and unless their finding is clearly erroneous it will not be disturbed." The death of this boy is a undoubtedly of considerable loss to the family and we are unable to say as a matter of fact that the verdict was excessive, and in view of the fact that it is so properly a matter for the determination of the jury we can see no reason for disturbing this verdict upon this account. After a careful examination of the record in this case we do not say that the verdict of the jury is manifestly against the weight of the evidence or that the court committed any reversible error in its ruling during the trial, and the judgment of the lower court is affirmed.

Not to be reported in full.

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

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2397

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

203 I.A. 156

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

T. E. Gage,

Appellee

vs.

No. 54

March Term, 1916.

The City of Vienna,

Appellant

ERROR TO
APPEAL FROM

Circuit COURT

Johnson COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 54. In the Appellate Court, Fourth District.
March Term, A. D. 1910.

T. L. Cage, }
Appellee. } Appeal from the Circuit Court
vs. } of Johnson County.
The City of Vienna, }
Appellants. }

McBride, J.

This appeal is prosecuted to reverse a judgment recovered by appellee for libel, &c. This case was argued this court on an appeal at the October Term, 1909, and after a hearing the judgment was reversed and the cause remanded for a new trial. The evidence contained in the former record is substantially the same as the evidence in the present record, and we refer the reader to the statement made in that opinion for the facts in the case.

The appellant insists that the evidence in this case is not sufficient to warrant a verdict for the plaintiff and that the court should have directed the jury to return a verdict for the defendant. We do not believe that the court was warranted in directing a verdict as there was evidence in the record tending to show that appellant was guilty of negligence and of committing the street at and near this place to be obstructed from time to time, at least the evidence was sufficient to submit the question of negligence to the jury under proper instructions and to do so at

Term no. 2A. in the
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I. J. J. J.
The City of
V. J.

McRidge, J.

This case is brought to the court for a
recovered by the plaintiff for the sum of \$100.00
this court on an appeal from the judgment of the
a hearing the judgment was affirmed and the case
for a new trial. The evidence in this case
record is substantially the same as in the
ent record, and no new evidence was introduced
in that opinion for the reasons stated.
The defendant in this case is not entitled to a new trial
and that the court is of the opinion that the
a verdict for the defendant. The court was
court was satisfied that the evidence in this
evidence in this case is substantially the same
entirely. The court is of the opinion that the
new trial should be granted. The evidence in
the evidence in this case is substantially the same
for the reasons stated.

think that the court here in 1911, in the case of
dict.

It is also stated that the court in 1911
mitting evidence of other vehicles and the condition of
the street and near the place where the accident occurred.
This case question was made when the law was in effect
there decided adversely to a plaintiff's contention and
see no reason for changing our views with reference to

There are, however, some instructions of the
the jury and refused for the plaintiff that in the
instruction which was given for the jury is as follows: "The court is of the

jury that the defendant, City of Vienna, is bound to use
use reasonable care, caution and supervision to keep the
streets and street crossings in a reasonable and condition
to travel in the ordinary modes of travel, and if it fails
to use reasonable care and caution to keep the streets and
and street crossings in a reasonably safe condition, it is
liable for the injury sustained in consequence thereof, pro-
vided the party injured is himself exercising reason-
able care and caution for his own safety before the acci-
dent occurred." Objection is made to this instruction
it in effect directed a verdict and a ~~dictum~~ ^{verdict} ~~notice~~ ^{notice}.
[It is said that it is in the nature of a

and in its character that it merely laid down the
principle of appellant's liability and that the
notice would be considered in determining whether or not the
appellant failed to use reasonable care and caution to

think that we are not
right.

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~~its streets in a reasonable safe condition.~~ [The defendant, however, ~~at the time that~~ read an instruction which was refused and contained the following language: "In this case even though you might believe that the plaintiff sustained his injuries complained of by reason of a person standing in the public street, still if you shall further find from the evidence that the said wagon was placed in said street by William Kattis, or by some other person in no way connected with the said city, and that said city neither actual or constructive notice of such obstruction, as explained in other of these instructions, than in such case the defendant would not be liable and you should find the issues for the defendant as to any damages recovered."]

~~It seems to me that in determining whether or not the plaintiff was using reasonable care and caution to keep his streets in a reasonable safe condition that it is necessary that they should consider the question as to whether or not Kattis, or any other person, had placed the wagon in the street, and that the city had either actual or constructive notice thereof. The rule is well settled that notice of the condition of the streets upon the part of the city and of the fact that it is obstructed or out of repair is one of the essential things to be proven and in reaching a verdict the instruction must contain the fact that the city had either actual or constructive notice. *Conover vs. City of Chicago*, 37 Ill. 2d, 167. *City of Chicago vs. Conover*, 127 Ill. 2d, 167.~~

In the former opinion rendered heretofore, for attention was called to the necessity of such a finding.

the streets in a case where the defendant is charged with a crime.

however, it is not necessary to prove that the defendant was in the streets at the time of the crime.

returned and obtained the evidence which was necessary to prove the case even though the defendant was not in the streets at the time of the crime.

obtained his information from the defendant's confession and from the evidence which was obtained from the defendant's confession.

standing in the public street, and the evidence which was obtained from the defendant's confession.

kind from the evidence which was obtained from the defendant's confession.

said street by William Smith, and the evidence which was obtained from the defendant's confession.

no way connected with the defendant's confession.

neither actual or constructive notice of the defendant's confession.

as obtained in other cases where the defendant was not in the streets at the time of the crime.

case, the defendant would not be liable for the crime.

the issues for the determination of the court and for the jury.

It seems to me that in determining whether the defendant was liable for the crime, the court should consider the following factors:

first, whether the defendant was in the streets at the time of the crime.

second, whether the defendant was in the streets at the time of the crime.

third, whether the defendant was in the streets at the time of the crime.

fourth, whether the defendant was in the streets at the time of the crime.

fifth, whether the defendant was in the streets at the time of the crime.

sixth, whether the defendant was in the streets at the time of the crime.

seventh, whether the defendant was in the streets at the time of the crime.

eighth, whether the defendant was in the streets at the time of the crime.

ninth, whether the defendant was in the streets at the time of the crime.

tenth, whether the defendant was in the streets at the time of the crime.

eleventh, whether the defendant was in the streets at the time of the crime.

twelfth, whether the defendant was in the streets at the time of the crime.

having given plaintiff's first instruction, we think it was error to refuse defendant's instruction No. 11, as well as other instructions offered explaining what was required to constitute actual and constructive notice.

Objection is also made to appellee's sixth and seventh instructions for the same reason but we do not believe that the point is well taken as to these instructions; at least we would not be inclined to rule so the mere because of the defect in these instructions, as each of them provided that to constitute liability upon the part of the city that the city must have permitted the obstructions to be upon the streets, and if the city permitted them this would in effect be notice that the obstructions existed. There is no instruction in the series that explains the difference between actual and what is constructive notice, and there is no instruction in the series that advises the jury that if the wagon was left there by a third party, and the city, by its manner permitting such obstruction, that then there would be no liability, and we think that under the recent decisions of the Supreme and Appellate Courts that it was a reversible error to refuse this instruction, in connection with the other instructions given.

It is true, as contended by appellee, that the record discloses that he was very badly injured, and that this is the second hearing in this court, and if the objections here urged were not as to points essential to a full recovery it might be overlooked but nevertheless we do not

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to constitute not a new
specification of a new
research institutions for the
believe that the point is well
of fear we could not be thinking
cause of the school in the
provided that the constitution
city that the city would be
had upon the report, and it was
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notice of the restriction, or inclusion to that effect there, either in fact or constructive, was necessary for recovery and the court having admitted the instrument referred to, and not having injected the element into appellant's first instruction, that the defendant committed reversible error, and the judgment of the trial court is reversed and the case remanded.

Very respectfully,

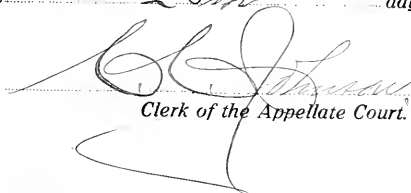
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 25th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

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2397

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 164

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

W. R. Daly,

Appellee.

vs.

No. 61.

March Term, 1916.

New Staunton Coal Co.,

Appellant.

ERROR TO
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. W. E. HADLEY

27 Feb 1917

Term In the
Court District.
March Term . . . 1901.

Am.)
vs.)
New Stanton Coal Company,)
Appellant.)
of the Court.

McBride, J.

On the trial of this case, the jury returned a verdict for the appellee in the sum of fifteen thousand dollars. A remittitur of \$5,500 was required to be made by the court, and judgment was entered for the appellee for \$5,500, to reverse which this writ is prosecuted.

It appears from the record in this case that the appellant was engaged in operating a coal mine in Illinois, and coal was hoisted therefrom by a perpendicular shaft and the coal was raised to the surface by means of the mine into the shaft by means of a cable. The main entry of the mine extended north, and the loaded cars were brought on to the main entry, and after they were there they were sent off to the south of the main entry, and later on taken out into the workings of the mine. It appears that part of the main entry, the shaft and the

Term

North

South

Am.

City

vs.

New
Appellant.

Verdict, 9.

in the trial of the

jury returned a verdict of

fifteen thousand dollars.

required to be paid by the court,

for the applicant for \$5,000.

is prosecuted.

It is a case from the

applicant was engaged in a

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The main entry of the

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one hundred fifty feet from the main entry, the run
run round, and then curved at a right angle to
the distance of about one hundred and fifty feet,
connected with the main entry at a distance of about
north entry, and at the south of the main entry
run round at a distance of about one hundred and
with the main entry. Between the main entry and the
round was another short curved entry called the
which began about fifty feet or more north of the
ran the distance of about one hundred forty-five feet
connected with the run around at the distance of about
seventy-five feet from where the run round connected
the main south entry. There was a similar run round
cross-over upon the east side of the main entry, which
not involved in this suit. The coal was loaded in the
main entry and to the shaft by means of electric
the entries were taken from the north main entry
west run around by the rotors into the shaft of the
mine. The rotors when passing from the north to the
side of the shaft usually passed out the shaft and
to the west run around and thence down to the
main entry where the trip of entries were collected
atory to taking them out in to the shaft of the
The cross-over was also at times used for taking
that may be required to be transferred from the
south side of the mine.

It appears from the evidence in this case
October 23, 1900, the following facts were established:

mining and lifting of coal. That a fellow worker
therein at the bottom of the shaft and was to be
base. That about 1 o'clock in the afternoon
brought a trip of coal from the west with an electric
and that about the time he brought in the coal
from the shaft north the distance of about 100
feet to what was called the machine shop to find the
manager. That while he was gone Lindisch had
from his trip of loaded cars and had passed to the north
side of the shaft for the purpose of looking
of empty cars and taking them out into the
entry called the west run around. The
from the main shaft and at the time he reached the
he inquired of some of the workmen if Lindisch had
into the mine with his trip of empties and how
he had. The appellee found four empty cars in the
over and in the performance of his duty he undertook
those empty cars from the cross-over down through the
run around to the main entry. There was a slight
the cross-over so that the cars would run
the appellee was riding on the rear end of the
as the front end of his trip passed into the
collided with the electric motor being operated
who had started out with his trip of empty cars
the west run around into the mine and as a result of this
collision the appellee was thrown from the cars
ground and the car ran over him crushing
otherwise badly injuring him. The motor that
operated by Lindisch had two lights, one of which

mining and a mining pool. The
therein of the bottom of the
does. That about a mile or so
brought a trip out to the
and that about the time a crossing in the
from the shaft north the distance
test to what was called the main shaft for the
manager. That while he was gone
from his trip of loaded cars and
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of empty cars and taking them out into the
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from the main shaft and at the time he was
he indicated of some of the workmen in
into the mine with his trip of empty cars
he had. The operator found four empty cars
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those empty cars from the cross-over and
run around to the main entry. He
the cross-over so that the cars
the operator was riding on the
as the front end of his trip
collided with the electric motor car
who had started out with a
the west run ground into the main
collision the operator
ground in the
otherwise being injured.

then candles in adjacent places. The first candle was placed upon the floor, but the first gave the rail. The other was an arc light that was located on top of the car, which had a reflector and gave light, as one of the witnesses described it, as similar to an automobile light. Some complaint had been made about leaving the car in their trip and Windisch claimed that it was the appellant who told him to look over his trip and see that he had all of his empties. It further appears that the light given by the sixteen candle power incandescent light was of little value and that prior to and up to within a moment of the collision the arc light had either been shut off or was turned so its rays were not reflected in advance of the motor and towards the place where appellant was engaged at his work so that the appellee did not see Windisch nor Windisch did not know of the approach of the appellee until a moment before the collision actually occurred and too late to prevent it. As a result of the collision appellee lost his right leg, which was amputated above the knee and left a stump about four and one-half inches.

It further appears that the appellee was known in the mine as the bottom boss and that he had jurisdiction over a territory of about three hundred feet each way from the shaft and his duties were to carry out the orders given to him by the mine manager and to assist in and assist the getting out of the coal.

It further appears from the evidence that appellant paid to appellee various amounts, including the amount

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he would have been in ... for several months, ... there had been payment to him of \$634.12. ... defendant also paid ... hospital and surgical bills ... to \$1,225.31. It appears from an admission in this case that appellant had refused to accept the provisions of the Compensation Act and operate its mine thereunder.

The declaration upon which the case was tried consists of three counts known as the third, fourth and sixth. The third count charges that the defendant by its said motor driver then and there carelessly and negligently drove and propelled said motor towards said intersection of entries last aforesaid without the head light of the same burning and in consequence thereof plaintiff was not reasonably advised and warned of the collision which was then and there about to occur between the said trip and the said motor and that plaintiff was unable to dismount from said trip in sufficient time to avoid the collision and injury. The fourth count charges that the defendant by its motorman negligently and carelessly drove said motor towards the intersection of said entry without keeping watch ahead for cars and without the head light on said motor burning and in consequence of said negligence the motor driver was not advised of the presence of the said trip of cars out on the run-around track in time to stop and check said motor and prevent said collision. The sixth count charges a wilful failure upon the part of the defendant to carry a conspicuous light on the front end of the said motor train and trip of cars as required by statute and that by reason thereof plaintiff was not reasonably

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warned and advised the motorman of the danger and a run in to escape from the trip and the injury was rising to such injury after the collision. The declaration the defendant filed a plea of not guilty.

It is insisted by counsel for the appellant that the injury was the action of the appellee in running the trip of empty cars to the bottom before reaching the motorman, was beyond the intersection of the cross-over and run around. It is further urged by the appellant that if there was any negligence upon the part of the motorman that he was under the control, management and direction of appellee and such negligence would be that of an employee which he could not recover. It is true that it is shown in the evidence that appellee was what was called bottom boss in the mine whose duty it was to carry out the orders of J. T. Ross the mine manager as to the men who work in the bottom. There was some dispute as to what territory was included "in the bottom". The mine manager testified it included about three hundred feet west and south of the shaft and that the run arounds were also included therein, but appellee denies that the run arounds were included in his jurisdiction. It appears that the mine manager would give appellee directions in the morning and at noon as to the work he wanted done and appellee would carry out those orders within the prescribed territory. It also appears that appellee performed such labor as was deemed necessary in and about the getting, setting and raising of the coal. There is no evidence in this record which that

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appellee had any authority to employ or discharge the mine manager. It was his duty to follow the orders. If I told him to direct the men to do something it was his duty to go and direct them to do it.

It does not appear to us that appellee had any power or authority as to the general plan of conducting the work but only authorized to do such things as were directed to do by the mine manager and direct the men in far as was necessary in the performance of the work at the bottom. It also appears from the evidence that there was a track from the south and one from the north to the hoisting shaft with the west end of it run around used in getting loaded and empty pit cars to and from the shaft, and that there was also an east and west cross-over used in getting cars to and from the run arounds. That on the day of the injury to appellee he had gone up to the tool shop to see the mine manager (but was unable to find him) and at about the time that appellee started from the shaft to the shop the motorman Windisch came in with a trip of loaded cars and left them at the shaft and in a short time ran around to the south side of the shaft and made a trip of empty cars and started with them to the west run around and that such trip was being pulled by an electric motor; that while the motorman was getting his trip of empties ready the appellee returned from the main shaft and passed through the west cross-over which connected the south end with the west run around; in this cross-over appellee found four empty cars and after having seen them that the motorman had come out in to the work with his

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trial of an automobile accident. The car came down to the street and around the corner and up and taken out into the lane. At about the same time cars that were being turned by the motorist around there was a collision with the motorist operated by Linditch and the car was driven by the appellant. He was on the rear car of the four and when the collision came appellant was not able to escape and as a result his right leg. The motor was equipped with a sixteen candle power incandescent light and an arc light. The sixteen candle power light gave out with a light. The motorman says he depended for light upon the arc light. Evidence tends to show that the motorman had aimed the arc light or had it so turning that it gave out light in the direction of appellee and in which the motor was traveling so that he could not see the approach of the car in time to escape injury and claims that if the motor had been throwing its rays of light in front of the car it would have lighted up the entry and the appellant would have seen the motorman in time to have escaped injury.

The third and fourth counts of the indictment charge, in substance, that the motorist was negligent and that it was negligence to drive it with insufficient lights. We are of the opinion that under the facts as shown by this record that it was a question for the jury to determine as to whether or not it was negligence in the defendant to equip the motor with the kind of lights testified to. It is said that the motorist was negligent at the bottom and that the defendant was negligent.

The first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a blanket after a long, hot day. I looked up at the sky, which was a pale, hazy blue. The sun was just starting to rise, and its light was soft and golden. I took a deep breath and felt a sense of peace. The world was quiet, and I was alone. I walked towards the horizon, feeling the wind on my face. The ground was dry and cracked, and the grass was sparse. In the distance, I saw a line of trees, their leaves a mix of green and yellow. The air smelled of earth and autumn. I continued to walk, feeling a sense of freedom. The world was mine, and I was the only one here. I walked until I was tired, until the sun was high in the sky. Then I sat down on the ground, looking up at the stars. The night was dark, and the stars were bright. I felt a sense of wonder, a sense of awe. The world was so big, and I was so small. I closed my eyes and let the stars fill my mind. I felt a sense of peace, a sense of calm. The world was quiet, and I was alone. I slept, and in my dreams, I saw a world of light and love. I woke up, and the sun was shining. I felt a sense of hope, a sense of joy. The world was mine, and I was the only one here. I walked towards the horizon, feeling the wind on my face. The ground was dry and cracked, and the grass was sparse. In the distance, I saw a line of trees, their leaves a mix of green and yellow. The air smelled of earth and autumn. I continued to walk, feeling a sense of freedom. The world was mine, and I was the only one here. I walked until I was tired, until the sun was high in the sky. Then I sat down on the ground, looking up at the stars. The night was dark, and the stars were bright. I felt a sense of wonder, a sense of awe. The world was so big, and I was so small. I closed my eyes and let the stars fill my mind. I felt a sense of peace, a sense of calm. The world was quiet, and I was alone. I slept, and in my dreams, I saw a world of light and love. I woke up, and the sun was shining. I felt a sense of hope, a sense of joy. The world was mine, and I was the only one here. I walked towards the horizon, feeling the wind on my face. The ground was dry and cracked, and the grass was sparse. In the distance, I saw a line of trees, their leaves a mix of green and yellow. The air smelled of earth and autumn. I continued to walk, feeling a sense of freedom. The world was mine, and I was the only one here. I walked until I was tired, until the sun was high in the sky. Then I sat down on the ground, looking up at the stars. The night was dark, and the stars were bright. I felt a sense of wonder, a sense of awe. The world was so big, and I was so small. I closed my eyes and let the stars fill my mind. I felt a sense of peace, a sense of calm. The world was quiet, and I was alone. I slept, and in my dreams, I saw a world of light and love. I woke up, and the sun was shining. I felt a sense of hope, a sense of joy. The world was mine, and I was the only one here.

trial of the case. All the parties to the case came down to the court room where they were called up and taken out into the lane. It was at the time the cars that were being propelled by the motor car. From there was a collision with the motor car which was operated by a ditch and a ditch or ditch by a ditch. He was on the rear car of the four and when the collision came appellee was not able to escape and as a result his right leg. The motor was equipped with a sixteen candle power incandescent light and an arc light with a reflector. The sixteen candle power light gave out little light; the motorman says he depended for light upon the arc light. The evidence tends to show that the motorman had either the arc light or had it so burning that it gave no light in the direction of appellee and in which the motor car was traveling so that he could not see the approach of the car in time to escape injury and claims that if the motor car had been throwing its rays of light in front of the car it would have lighted up the entry and enabled appellee to see the motorman in time to have escaped injury.

The third and fourth counts of the bill of particulars charge, in substance, that the motor car was not properly equipped and that it was negligence to equip it with such inefficient lights. We are of the opinion that under the facts as shown by this record that it was a question for the jury to determine as to whether or not it was negligence in the defendant to equip the motor with the character of lights testified to. It is said that the defendant was the manager of the motor and that the defendant was the driver.

control of the vehicle, and that it was the negligence of the appellee, as the driver, which proximately caused the injury, and that by reason thereof he was barred from recovering herein. This contention is sought to be further sustained by the fact that the appellee claims that at no time during the trip did he ever look back over his trip and see the condition of his empty cars and the motorman says that at no time at the moment of the collision he had been using the procedure of looking back over his trip. It appears from the evidence that the motorman could have looked over his trip and seen that he had all of his cars before starting towards the rear around. The motorman was pursuing his business as usual proper to him in the usual manner and in the line of his general employment and without any specific direction by appellee as to the management of this particular trip. The appellee was at another place engaged at work and no work was done and was at the time of his injury performing the duties of a servant and as such was a fellow servant. It is true and even if he did at times sustain the master's duties as boss or foreman this would not preclude him from recovery arising out of the master's negligence, unless he was relieved from such right by being a fellow servant. The appellee is appellant to accept the provisions of the act which would preclude it from the defense of fellow servant. The appellee was not at the time of his injury engaged in the performance of a vice principal. "A vice principal is one who is engaged in the discharge of some duty or the exercising of some power which belongs to the master, as such, and is not a fellow servant."

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as a vice-principal when engaged in any work which pertains to the duty or employer of the master, just as an agent does not act as an agent when doing so outside of his agency. *Shearman & Redfield Reg. 2217*. *Decatur Cereal Mill Co. vs. Cogerty*, 80 A. 2., 686. It is true that one may be a vice-principal in respect to certain acts and a fellow-servant as to others. A section master in giving commands to his men is clearly a vice-principal, but if he joins the men under him in doing the common work which they are doing he is as to such work a fellow-servant, and the master would not be liable for an injury resulting from the careless manner in which he performs such common labor". *Chenoweth vs. Lurr*, 242 Ill., 317. Under the common law the fact that an act of negligence by the master committed by a fellow servant would relieve the master from liability because of his being a fellow servant, but under the compensation act the master is deprived of the benefit of any rights that accrue to him by reason of the fellow-servant rule.

It is insisted by counsel for appellant that under the sixth count charging a failure to display a conspicuous light on the front of the car the appellant says, "The car as the conspicuous white light on the front end of the car is concerned the evidence shows conclusively that on the front of the motor, two feet above the rail, a 150-watt candle power incandescent electric white light was actually burning. The statute under which this count is brought provides that a conspicuous light shall be carried on the

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front of every car on the train it was a very bright light. There was evidence tending to show that the light was a low incandescent light was carried on the side of the car two feet above the rail but the witness who testified introduced by appellant said, "the other light was a candle, the sixteen candle power light was located in front of the car two feet from the rail; so far as lighting the entry was concerned it did not light it up very much; I relied upon the arc light by which to determine the way of the motor". Whether or not this was a conspicuous light or such a one as was required by the statute to be carried on the motor was as we think purely a question of fact for the jury. Eldorado Coal & Coke Co. vs. Wagon, 17 V. 101, 102. The light, according to the testimony of the witness, would have been of such brilliancy and it may be that if a sufficient light had been displayed that the appellee would have been able to have observed its reflection and known that the motor was approaching in time to have avoided the collision. These were questions for the jury to determine.

Appellant contend that the evidence relating to the third and fourth counts clearly demonstrates that the proximate cause of his injury was the collision with the car sending the trip of empty cars to the bottom of the cut which was beyond the intersection of the cross-over and main track around. The facts and circumstances under which the injury occurred were all presented to the jury and it is to be understood the law it was for them to determine the proximate cause of the injury. "If the light caused the injury,

was known by common experience to be a likely cause of the injury, and the injury is most likely to follow the act of negligence in the ordinary course of events, it is always a question of fact for the jury whether the negligence was the proximate cause of the injury. See *Chicago & North Western Ry. Co. v. Galt*, 189 Ill., 138. In *McQuinn v. Coldwater*, 202 Ill., 148. The evidence submitted to the jury, to say the least of it, tended to show negligence upon the part of the motorman in the operation of the motor in the manner herein before described and we believe that under the decisions of the Supreme Court that the question of proximate cause was one of fact for the jury to determine.

It is contended that the court erred in the admission of testimony. The appellee returned from the cabin and just before entering the cross-over to reach the cars that were there he inquired of Evans and Davis, two of the workmen at the bottom, if the motor had gone out and was informed that it had, without giving the conversation that took place. The objection to any conversation was sustained by the court and the witnesses simply permitted to give information that it had gone out. Even if this were so we cannot see how the rights of appellant were prejudiced by this testimony. The only effect that it could have was as to the care exercised by appellee for his own safety in starting the cars upon the cross-over. Since the motor had gone out with a trip of a mile and only the negligence of appellee of contributory negligence, which, under this statute could not in any manner be a bar to recovery.

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of a candle, it is in fact a charge of negligence charged.

Objection is made to appellee's third instruction, that it quotes the whole of the statute which refers to a light as well as white and that there was no proof as to a red light and the jury might infer that the defendant's red light contributed to the injury. We do not think the jury could have been misled in the manner suggested. The sole contention was as to whether or not there was a white light on the front of the motor, and as there is no evidence in the record showing any reference to a red light we are left to see how the jury could have been misled. Besides, the appellant by its instruction No. 14, advised the jury that if they found from the evidence that there was a kerosene candle or electric light burning on the front of the motor and that such light was a conspicuous white light then as to such charge you must find for the defendant. The instruction directed a verdict and based it upon the defendant having a conspicuous white light on the front of the motor. The objection to this instruction is without merit.

We do not think the criticism taken upon the sixth instruction well taken. This instruction advised the jury of the fact that if the defendant elected not to appear to under the condemnation act that it was deprived of certain defenses prescribed by statute. This is certainly the law and we can see no impropriety in the jury being fully advised as to the defenses that appellant was entitled of. It is wholly different from the one contained in the case referred to and relied upon in the case of Price

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that it covered the whole of the area of the light as well as white and red light and the jury of light contributed to the injury. could have been aided in the jury's contention as to whether or not there was on the front of the motor, and as there was the record showing any record as to the to see how the jury could have been aided. appellant by the instruction no. 14, which if they found from the evidence that there was candle power electric light burning in the motor and that such light was a continuous light then as to such charge you find it true for the instruction directed a verdict and there is no defendant having a connection with the light motor. The objection to this instruction is that we do not think the evidence supports it. sixth instruction well taken. The jury of the fact that the defendant operated the motor and the light of the certain defendant, which was the law and as a result of the fully advised of the facts of the case and the jury returned the verdict.

vs. Glover & F. and A. Lind., on writ, 1887, 10, 17.

The seventh instruction advised the jury that it was the duty of the motor man to exercise reasonable care in the management of the motor as charged in the fourth count, and that if he discharged this duty then it could be no defense that plaintiff by his conduct contributed to such injury. This instruction does not direct any verdict and as we view it merely presents the plaintiff's view of the case and we do not believe that a failure to include in such instruction the defense urged can be a reversible error; besides, the appellant in its thirteenth instruction advised the jury fully as to the rights of appellant if they found that the injury resulted from obeying an order of an elcee, and the one referred to in the criticism.

Complaint is made of the modification by the court of appellant's ninth instruction. The portion in question is, "while the mere fact (if you find it to be a fact) that Daly was guilty of contributory negligence is not sufficient in this case, yet if you find that Daly was negligent and that such negligence was the sole proximate cause, and that the sole, real and direct cause of the injury in question, then such negligence on the part of Daly will bar his recovery by him in this case and you shall find that he is permanent not guilty." The objection urged is that the court inserted the word "sole" before the word "proximate," and the statute provides that an employer operating a motor car without electing to provide and pay compensation for the provisions of the compensation act that it is not a motor car.

defence that "the injury or death was caused by the
the contributory negligence of the employee" and that the
instruction as presented was not proper in that it
did not set in its proper light and we think it is
sustained by the decision of this court in 27
vs. Big Muddy Coal Co., 173 Ark., 1923.

As to the objection that the instruction was
flawed which we have examined, the objection has
been fully considered and determined in the
case.

It is stated that in Barton, one of the
cases for plaintiff, stated in his opening statement, that he
had accepted the provisions of the contract and that
would have had to pay all of the expenses of the contract
certain and specified sums for each year. It is
stated to accept the contract and that he
not have been necessary to pay the sums specified
in a different way, not in cash, but in kind, and that
have had to hire a horse, a cow, a pig, a sheep, and
statement was fully made that the contract was for the
of this case and we are not to say that the contract was
thing in it of such a nature as to require the plaintiff
the jury to find the contract was not valid. It is
reputed a contract and that the contract was not valid
the contract was not valid. It is stated that the contract
as excessive, and that the contract was not valid. It is
true that it is a contract and that the contract was not valid
by parties who are not parties to the contract. It is
sick and as for the contract, it is not valid. It is
time also to the contract, it is not valid. It is

that the injury was not caused by the negligence of the
the driver of the car, but by the negligence of the
the driver of the car, but by the negligence of the
when it is taken into consideration that the driver of the
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in the future, we are not to say that the driver of the
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jury to determine. We are not to say that the driver of the
in this regard that the verdict is not proper, but that
against the weight of the evidence in the case, that the
the guilty of negligence and that the negligence of the
of was the reason to cause of the injury to the driver.

We see no reversible error in the ruling of the
court during the progress of this trial. It is the duty
that the appellant had in this trial and it is the duty
to present a defense to the jury, and the ruling of the
lower court is affirmed.

THE COURT:

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 17th day of November, A. D. 1916.

Charles C. Johnson
Clerk of the Appellate Court.

OPINION

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Vol. 203

2112

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 176

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

H. C. Barnard,

Appellant

ERROR TO
APPEAL FROM

vs.

No. 74

City COURT

March Term, 1916.

East St. Louis COUNTY

Queen City Quarry Company et al.,

Appellees

TRIAL JUDGE

HON. ROBERT H. FLANNIGAN

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7-2-1964

U. S. DEPARTMENT OF AGRICULTURE

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

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ment of his salary involved an error in calculation. He
conceded that the \$100.00 of the salary advance, which
he had received in 1948, was not a part of his salary,
upon which the income tax was levied. He stated that he
had not been advised of this fact until 1950, when he
was advised by the Internal Revenue Service that the
advance was not a part of his salary.

He stated that, in 1948, he had received
this advance payment of \$100.00, which was not a
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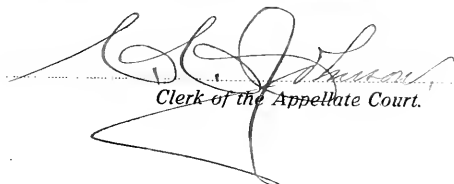
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 25th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 187

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Woods & Boyd,

Appellants.

vs.

No. 77.

March Term, 1916.

ERROR TO
APPEAL FROM

Circuit COURT

Edwards COUNTY

Edwin Gamper and A. F. Cook,

Appellees.

TRIAL JUDGE

HON. JULIUS C. KEFN

Term 8. 77.

In the ... Court,

Fourth District.

March Term . . . 1914.

James A. Woods and Edward Boyd, }
partners doing business under }
the firm name and style of }
Woods & Boyd, }
Appellants. }

vs. }

Edwin Camber and A. L. Cook, }
Appellees. }

Appeal from the }
Circuit Court. }

McBride, J.

This case was determined upon the record on the judgment rendered against the plaintiff or co-pl.

This case is based upon a written agreement entered into by and between the plaintiffs and the defendants. The declaration consists of three counts in each of which the agreement is set out in haec verba. The declaration alleges that on September 7, 1914, a contract was entered into between the plaintiffs and the defendants by which the plaintiffs were to drill an oil well for the defendants on certain lands in the county of Edwards, for which the defendants were to pay two dollars per foot, and other consideration for pulling the casing after the well was completed, the agreement set out is in substance as follows: That Woods and Cook were co-partners and were entitled to the first part, and Woods and Boyd were co-partners and entitled to the second part. The parties of the first part employed ...

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James A. ...
partner of the ...
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McBride, J.

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of the second part to drill an oil and gas well in the State of Oregon, at or near the oil and gas lands of the first part, in the County of Clatsop, Oregon; the said well was to be drilled to a depth of at least 1750 feet, unless oil was found in quantities at a less depth. The parties of the first part were to pay parties of the second part for the drilling of such well the sum of two dollars per foot, also for the cost for pulling the casing when the well is completed, and in the case of a shooting of the well they were to be paid fifty dollars per day for preparing the well for shooting and cleaning out the same. Also the first parties were to pay the freight upon the machinery. The second parties were to furnish all labor, tools and machinery and fuel for the drilling of the said well. There is also a clause in the contract that the first parties were to deposit the sum of \$30,000 in the Bank of West Salem to be held by said bank until completion of said well, which was to be paid to the parties of the second part in liquidation of the amount due them for drilling the well in accordance with the terms of the contract.

The contract contained the following clause, "That it will be necessary to continue in determining the location of the well at issue herein and this clause recites, 'That it is the intention of the parties of the first part to organize a corporation to take over the oil and gas lands in which the said well is to be located, and certain other oil and gas lands, leases, rights and obligations under this contract, and when so organized the parties of the second part hereby agreed to subscribe for and pay for twenty-five shares of

for drilling the well in accordance with the contract.

[illegible]

the capital stock of said corporation at ten dollars per share, or to allow the fair value thereof to be paid in the consideration to be paid them under this contract in consideration of such stock". The contract further provides that if any question should arise as to the enforceability of such condition shall be controlled and decided by the Ohio Oil Company's usual and customary contract for drilling of oil and gas wells. The contract is signed and sealed by each of the parties.

The declaration then avers that they drilled the well to the depth of one thousand seven hundred and sixty (1761) feet, and completed their contract according to its terms and provisions and that the defendants refused to pay to the plaintiffs the said amount so agreed by the contract, or any part thereof. The other counts of the declaration were substantially the same. To this declaration defendants filed a plea of general issue and several special pleas, and among them a plea called the seventh plea, which avers that the plaintiffs ought not to have their said action, "because they say this suit is maintained by the plaintiffs upon an alleged agreement in writing, recited in haec verba in the said declaration and each count thereof, and it appears by the said agreement declared upon 'That it is the intention of the parties of the first part herein that these two defendants to organize a corporation to develop the oil and gas lease upon which said well (being now in controversy) is to be located, and cart in oil and gas, and their rights and obligations on or after the

the capital stock of said corporation at par or
share, or to allow the or value thereof to be
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witness that if any condition shall be controlled and decided
and that such condition shall be controlled and decided by
the Ohio Oil Company's usual and customary course in the
drilling of oil and gas wells. The contract is hereby
sealed by each of the parties.

The declaration then avers that they drilled in
well to the depth of one thousand seven hundred and thirty
(1730) feet, and completed their contract according to the
terms and provisions and that the defendants refused to pay
to the plaintiffs the said amount so agreed upon in writing
paid, or any part thereof. The other counts of the com-
plaint were substantially the same. To this declaration
defendants filed a plea of general denial, and also a plea
plea, and among them a plea called a plea of non est, which
which avers that the plaintiffs ought not to recover, and
said action, "because they say that the defendants have
the plaintiffs upon an alleged contract or agreement, and
in fact verily in the said declaration and complaint, and
and it appears by the said evidence that the defendants
is the intention of the parties of the contract, and
these two defendants to deprive the plaintiffs of their
the oil and the lease upon which said oil is produced
in controversy, and to be located, and a right to the
gas lease, and their rights and all of the same.

tract"; and that the plaintiffs having so agreed with the defendants, the corporation was organized under the laws of the West Salem Oil and Gas Company, the corporation was organized and its charter granted by the Secretary of the State of Illinois on the 2nd day of October, 1914, and soon thereafter the West Salem Oil and Gas Company took over the land upon which the well was to be drilled by the plaintiffs, thereby, as provided in the said agreement, the plaintiffs, these defendants and the plaintiffs, succeeded to all the rights and obligations of these defendants under said agreement, and which was acceptable to the plaintiffs, and after the said plaintiffs worked and drilled on the well under the directions and employment of the said West Salem Oil and Gas Company, and not of these defendants, and from that time all the work of drilling the well done by the plaintiffs and all the matters and things pertaining thereto, until the plaintiffs quit and abandoned the work, was done for the West Salem Oil and Gas Company and not for these defendants; and by reason thereof they were discharged and discharged from any and all liability under said agreement, which was well known to the plaintiffs and reasonable to them, and all business was done and performed by the plaintiffs and the West Salem Oil and Gas Company and not with these defendants". To this also the plaintiffs filed a special and general demurrer, which was overruled by the court, and the plaintiffs having elected to stand by their demurrer, judgment was rendered upon this plea in favor of the defendants, to which ruling of the court the plaintiffs appealed and prayed an appeal to this court and now pray that the court

[illegible]

consideration the question as to the sufficiency of this seventh special plea to bar the plaintiffs right of recovery.

This plea is based upon that clause in the contract above quoted, which provides for the organization of the corporation to take over the leases referred to in the contract and their rights and obligations under the contract, and that the plaintiffs are to subscribe for twenty thousand shares of the capital stock at ten dollars per share.

We have examined this contract, and the clause therein referred to, carefully and we believe that this clause of the contract is simply a recital of what the defendants intended to do, that is, to form a corporation to take over the oil and gas lease upon which said well was to be located and certain other oil and gas leases and their rights and obligations under this contract. We then aver that the corporation was organized and took over the lease upon which the well was to be drilled and that as provided in said agreement succeeded to all the rights and obligations of these defendants under said agreement. The object of the pleader seems to have been to set up an agreement whereby defendants were to organize a corporation and as soon as done that the obligations and liabilities of the defendants were to be assumed by the corporation and the defendants released. To do this it was necessary that the pleader should set out such an agreement with definiteness and certainty and not in a mere argument. This is so in *Ing, Dec. 133. Buttrough on Pleading and Practice, § 17.*

Does this plea so allege? It sets out the intention to organize the corporation and its organization and the fact

consideration the same as to the but agency
seventh special plea to the plaintiff's right to
This plea is based upon what is in the
also quoted, which provides for the assignment of
corporation to take over the lease referred to in the
tract and their rights and obligations under the lease
and that the plaintiffs are to succeed to the lease
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we have examined this contract, and we believe
clause referred to, carefully and we believe that the
clause of the contract is simply a recital of the
defendants intended to do, that is, to lease the oil and
take over the oil and gas lease upon which the
to be located and certain other oil and gas lease
their rights and obligations under this contract.
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the lease upon which the well was to be drilled
as provided in said agreement proceeded to all the
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the object of the plea seems to have been to
agreement whereby defendants were to be released
and as soon as done that the obligations of the
the defendants were to be assumed by the corporation
defendants released. so as to let it be known that
pleader should set out such an agreement with
and certainly and not in a mere recital of the
ing, Dec. 1931, and nothing on the subject
does this plea allege
to operate the corporation and the oil

ing over of the lease and then over that there is, provided in said agreement, such corporation succeeded to all the rights and obligations of the defendants under this agreement. If the pleader refers to that part of the agreement set out in the plea, an examination of this shows that all it amounts to is a declaration of an intention to organize such corporation and take over certain leases and their rights and obligations under this contract; if the pleader refers to the agreement set out in the declaration (which we believe he does) then such agreement declares an intention to organize the corporation and take over the leases, which is immediately followed in the same clause by an agreement upon the part of the plaintiffs to advance and pay for twenty five shares of stock at ten dollars a share, either in cash or to be deducted from the amount agreed to be paid for drilling of the well. This is held to be the true meaning of this provision in the agreement and that it does not provide and was not intended to release the defendants from their obligation to pay for the drilling of the well upon the organization of the corporation, but was inserted for the purpose of requiring plaintiff to accept twenty-five shares of the stock in any event for the work. It is true the plea also alleges that the defendants worked and drilled under the direction and employment of the corporation and for it, and not for defendants; even if the plaintiffs did so work that would not discharge the defendants from their obligation to perform according to the terms of the contract unless there was a specific agreement to

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and let out to such work as may be. It is also
red in said order that by reason of the illness of the
tenants are released of the same. This is a
conclusion of the lower court. I believe that this is
indefinite and uncertain and that it does not set out
facts as to release defendants from the payment of the
performed under the contract.

The judgment of the lower court is reversed and
the cause remanded with directions to sustain the
to the defendants seventh plea as pleaded.

REVEREND JUDGE OF THE SUPREME COURT

Not to be reported in full.

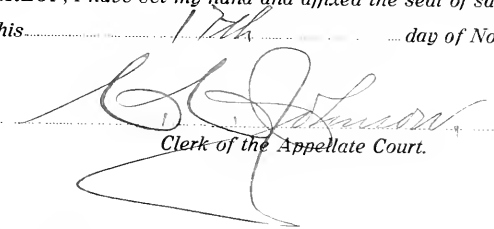
and et al. on the 1st of March 1941. The
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the case remanded with the 1st of March 1941.
to the 1st of March 1941.
1st of March 1941

not to be reported in 1941.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this..... day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 188

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Twelfth}~~Thirteenth~~ day of ^{December}~~November~~, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Asternisa Park
Appellee

ERROR TO
APPEAL FROM

No. *21* vs.
March Term, 1916.

Circuit COURT

Caroline Penn
Appellant

St. Clair COUNTY

TRIAL JUDGE

HON.

George A. Brown

March Term, 1916.

Artemissa Clark,

Appellee

v.

Caroline Leann.

Appellant

Appeal from St. Clair.

Opinion by Judge J. J.

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This was a suit brought by appellee against appellant to recover damages on account of several and permanent injuries received by her by falling down a defective stairway in a house owned by appellant, rented to appellee's husband and occupied by him and his family. The jury returned a verdict against appellant for \$100.00 for which amount judgment was entered against her.

On November 20, 1913, appellee's husband decided to rent a house for himself and family and, according to the proofs, a son and daughter of his, at that time called the "for rent" sign of Beckwith Brothers Company, State of the premises, went in the back way and, after having examined the same, the premises consisted of the second story of ~~the~~ a brick building. After entering the office of Beckwith Brothers Company, the father, after looking at the place, and that there was a cellar in the basement, a door off the living room and a door into the front stairs loose. He was told, however, that the rent was \$10.00 a month in advance and that he would put \$10.00 up the repairs would be added to it.

Later the sister took the \$10.00 and the next day the balance of the rent for the month was

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board, the board in the stairs, and the fact that the board was loose.

The board in the stairs was loose on Monday evening, appellee, was at the house and did not know of its defective condition. She went to the front stairs with a lamp and when she stepped on the board, it slanted forward with her, throwing her to the bottom of the stairs injuring her spine and other parts of her body, severely. At the conclusion of appellee's evidence, the attorneys for appellee filed an amended declaration setting forth the facts so far as they were stated and charged that Beckwith Brothers & Company, the agent of appellant to rent the premises; that they agreed to rent the premises to appellee for a certain term of time and then and there promised and agreed that they would repair said loose or insecure board or plank on said stairway and that appellant agreed with said company to rent said premises on said terms and conditions and to use them. The case went to the jury on this declaration, and after the verdict was returned and a motion for a new trial was made, the court permitted appellee to file an amended declaration which omitted the statement of the promise to repair the defective stairway on the part of appellant's agent.

Appellant contends that the court erred in its rulings in regard to the evidence and in regard to the instructions, and also that the verdict is against the evidence. That there was a loose board on the stairs, that appellee was walking on the stairs, that it tipped forward when she stepped on it, caused her to fall down stairs, that she was injured, that her fall and that her injuries are severe, were not questions in dispute, nor was there any question of the husband of appellee and their relationship to the board of the loose board. The court is of the opinion that

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...with ... es, they ... ing her and ... out her care had no right to ... appellant, through her agent, failing to ... complained of after promising to do so. The rule ... on by appellant, is stated in *Manarack v. ...* 1904, 1909, where it is stated, "The law is well settled that the rule of express estoppel applies to a contract to let, and the landlord is not bound to make repairs unless he has assumed such duty by express agreement with the tenant. The tenant takes the premises as he finds them, at his own risk, and there is no implied covenant on the part of the landlord that they are fit for habitation or for the purposes for which they are rented, or that they are in any particular condition. The landlord is therefore not liable for damages resulting to the tenant from the state of the demised premises being out of repair, unless he has expressly bound himself to make repairs by the terms of the contract to let". The declaration upon which the case went to the jury contained a charge of ^{promised to} ~~repair~~ part of the landlord through her agent, at the time before judgment so as not to include any charge of failure to keep a promise to repair, and counsel for the appellant here say that they do not rely upon such a charge in the judgment in behalf of appellee.

It appears, however, that the promise to repair was offered ^{by Appellee} and admitted, while her counsel insist that this was not a proper notice to appellant of the condition of the building, but was a mere statement of fact.

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... to appellant's case. ... the declaration contained the ... repair on the part of an client and ... with that declaration in view.

It may have had much to do with ... to give a verdict in favor of plaintiff, though it was ... ly incompetent after the amendment of the declaration. It is upon the declaration as amended that verdict, and appellant must rely to sustain his judgment, and considering the condition of the record as stated, we are inclined to the belief that the admission of this evidence must be held to have been error on the part of the trial court. The facts in this case showed that the defective condition of the step in question was not latent, but was easily discoverable and was known both to tenant, who was the husband of appellee and her children. The question therefore arises whether she occupied a position separate and apart from her husband as a third person, so far as the rental contract and her occupation of the premises, were concerned, or whether her rights were identified with those of her husband. It is plain that the husband could not recover for injuries caused by the defective condition of the step in the absence of a contract to repair, as is the case here, and it is to be determined whether appellee, his wife, residing with him, is entitled to recover for injuries occasioned by the defective condition of the premises of which he was fully entitled. The authorities upon this subject are not altogether satisfactory, but the general rule appears to be that persons identified with a tenant, ^{or his} have the same right to recover against the landlord as the tenant's rights would have been had the accident occurred to him. The state and

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made in ²⁴ Cyc. on page 1119, bearing upon this subject, "the general rule is that a sub-tenant, agent or servant of the tenant, is regarded as so far identified with the tenant, that his right to recover against the landlord is the same as the tenant's right would be had the accident happened to him; but he can have no greater claim against the landlord than the tenant himself would have under like circumstances." And this rule appears to be sustained by a number of authorities there cited. If a tenant, agent or servant of a tenant must be regarded as so identified with the tenant that he cannot recover against the landlord if the tenant could not recover, there would appear to be even more reason for holding that the interests of the wife of the tenant were so identical with his, that she could not be permitted to recover in a case like this where the tenant himself had no right of recovery. For the reasons above given, we are of opinion that the judgment in this case must be reversed, and as we are of opinion that no recovery can be had under the facts so claimed to exist by appellee, the cause will not be remanded.

Reversed.

Statement of facts to be incorporated in the opinion.

We find that the lease to the premises in question, was made between appellant and appellee, the husband of appellee; that there is no claim of a separate declaration, of any covenant in the lease as to the condition of the leased premises; that the defective condition of the main way, which caused the injury to appellee, was known to appellee's husband; that at the time of her injury appellee was residing in the leased premises with her husband and their family,

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Not to be reported in full

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 13th day of December,

A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

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2406

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 189

THOMAS E. PASLEY, Sheriff.

January, A.D. 1917

And afterwards, to-wit: On the ^{Eighth} ~~Thirteenth~~ day of ~~November~~ ^{January}, A.D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The People ex rel. Silas Cook et al,

Defendants in Error.

vs.

No. 8

October
March Term, 1916.

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

W. C. Goodall, et al,

Plaintiffs in Error.

TRIAL JUDGE

HON. GEORGE A. CROW



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Journal of Management Studies 31(7) 947-967

THE UNIVERSITY OF CHICAGO

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Journal of Management Education 30(6)

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Journal of Management Education

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Journal of Management Education 30(6)

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pany is still in the interim between the time of the election and a verdict in accordance with the instruction of the court and thereupon a judgment of ouster on the verdict and for costs was entered against the respondents, who have been at the case here for some time, by writ of error. It has been long the right of respondents to demand the return of the office of each of them and the principal question for our consideration, is the legality of the election under which the relators claimed title to such offices. The following provisions of the by-laws of the company aided the officers involved, to justify their duties and responsibilities in the manner of their election:

"Article III.

"Section 1. The officers of the company shall be president, vice-president, secretary and treasurer, and a board of directors, consisting of seven members, who shall be elected at the annual meeting of the company, when shall be the president, vice-president, secretary and treasurer of the company. The officers and directors of the office shall continue to hold such office until their successors are elected and qualified.

Section 2. The officers and directors shall be elected by ballot at the annual meeting to be held on the first day of January and annually thereafter.

Section 3. In all meetings of the members of the company, it shall be lawful for any member of this company to be represented by a properly delegated agent, who shall have full power to represent said member at said meeting, and such agent shall have the same rights, powers and privileges as the member delegating or appointing him would have if he were personally

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present at such meeting, and the vote cast by him shall have the effect of a majority vote of the members of the board of directors coming before the membership of the company shall have the same credit and effect as it would have if it were actually cast by the member delegating or authorizing him to vote. Article IV.

Section 1. The board of directors shall elect a president to preside at all meetings of the board of directors, and to have general supervision over the management and affairs of the company, subject to the direction and approval of the board of directors. In the absence of the president, the vice-president shall preside at the meetings of the board of directors and shall have the same power as the president, subject to the direction and approval of the board of directors.

Section 2. It shall be the duty of the secretary to keep full minutes of all meetings of the board of directors; to prepare and read all communications of the members and of the board of directors.

Article V.

Section 1. The members shall assemble in regular session at the City of East St. Louis, Illinois, on the first day of January of each year, unless such day shall be a legal holiday, in which event said meeting shall be held on the following day. The secretary shall cause to be published in two papers of general circulation in the city of East St. Louis, not more than twenty days and not less than ten days before the date of such annual meeting, notice of the time and place at which such meeting is to be held.

present at such meeting. The election of my attorney before the coming before the honorable of the same credit and effect as if the same had been done by the person designated in the

Section 11. The Board of Directors shall have the right to elect or remove any officer or director of the Corporation, and to fill any vacancy which may occur in the office of any officer or director. The Board of Directors shall also have the right to elect or remove any officer or director of the Corporation, and to fill any vacancy which may occur in the office of any officer or director. The Board of Directors shall also have the right to elect or remove any officer or director of the Corporation, and to fill any vacancy which may occur in the office of any officer or director.

Section 8. It shall be the duty of the Board to keep full minutes of all meetings and to cause the same to be entered in the records of the Board of Directors; and to cause the same to be entered in the records of the Board of Directors.

[illegible]

Section 4. The members of the Board of Directors for the transaction of business of the corporation, and four directors shall constitute a quorum for the transaction of business at any meeting of the Board except as herein otherwise provided, and the Board in either instance may govern the meeting.

It is agreed by said parties that the next meeting to be held for the annual election of officers and directors of the Metropolitan Building, Inc. shall be held on January 31, 1916 at 2 o'clock in the afternoon in the Metropolitan Building, on West 41st Street, New York City, given in strict accordance with the by-laws of the corporation and introduced proof tending to establish the same in the case were as follows: Before the meeting for the election, the relations had been interrupted by a fire alarm, which locked the door and refused to admit the members, respondents and certain other persons, since which time, by unlocking the side door, to which W. C. Woodruff had access. At two o'clock, there being no vote on the part of the members to call the meeting to order, W. C. Woodruff called it to order and was nominated to preside over the meeting by B. Miller, whereupon said Woodruff took the chair and called a sergeant at arms. W. C. Woodruff had been a member of the corporation for a year before and had tendered his resignation in January, 1915, which was accepted November 20, 1915, and he was not a member of the corporation, however, to be still a member because the by-laws provided that the officers who be held over until their successors were duly elected and qualified and that if no successor had been properly elected, the officers who had refused to elect themselves were not to be considered as having resigned.

[illegible]

meeting held on November 21, 1918. William L. Grede, who claimed to be president of the company, together with a number of directors, protested against the introduction in the proceedings of J. C. Goodell and Clyde H. Miller on account of the supposed contradiction of their policies and refused to participate in the meeting unless the two said members were excluded. J. C. Goodell as secretary made an announcement and also stated that he would not take part in the meeting unless the two said members were excluded. Thereafter the meeting thereupon appointed secretary Grede and transferred his duties as such. The meeting proceeded by a committee of members endeavoring to carry out the eligibility of members, read the proxies presented to them and elected respondents directors as named in their pleas. Afterwards the respondents sat at a table on the east side of the case room in the above meeting in order to have been held, and the meeting was called to order by vice-president Goodell and again presided over by William L. Grede as director and as a relator. Grede was elected as secretary of the company. The second meeting, which respondents attended, was held to order until after their meeting, and jointly, they failed to elect relators officers and directors of the company as stated in their petition for leave to file the affidavits. Respondents claim that in their meeting in addition to the members present in person, there were 11 proxies which gave them a quorum and that the proceedings were in every way regular. Upon the trial, however, the respondents concluded all but about 1/3 of these proxies were invalid and that there was not a proper quorum of their company.

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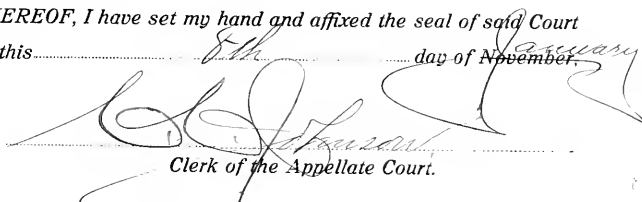
relator Albert Weiss, as the officer in charge of the meeting, at 8 o'clock, witnesses of which it was held. The meeting was held in the vice president's office called to order by the relator, who was seated at the head of the room, which was presided over by the relator, Albert Weiss, one of the relators. At this time, the relator and one Albert Weiss, who was elected at the meeting, were seated at the head of the room, and the relators were seated at the respective parties.

It is not necessary for us to say whether the election at the meeting presided over by the relator, was a valid election or not as the sole question presented is the right of respondents to hold and exercise the office of directors of said insurance company and the right to do so end upon the regularity of the election which has been held at the meeting presided over by A. C. Goodell. The respondents were bound to state in their affidavits, that the relators, good authority for acting as directors, and the relators were entitled to a judgment or decree. The relators v. The Insurance Co., 112 Ill. 190. The relators clearly that as soon as the hour was reached, the relator A. C. Goodell called the meeting to order and the relators, including the service of an injunction writ upon the relators, who took just previous to the meeting restraining the relators from presiding, would not be able to do so at the meeting for that purpose and that the party with an interest in the company helped to carry out that design. The relators of the company provided that it was the duty of the relator to provide for all meetings of the company and in the absence of the relator, the vice president would be elected. The relators

Theory of the Law of the Sea

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 8th day of January,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

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591 - 21989

PEOPLE ex rel. MARTIN J. QUALKY,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

203 I.A. 191

Appeal from
Circuit Court,
Cook County.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Petitioner filed his petition, amended, for a writ of mandamus, seeking to be restored to the position of detective sergeant of the police force of Chicago. To the petition the defendants interposed a demurrer, which was overruled: a judgment rendered that a writ issue as prayed for. Defendants have appealed to this court but the appellee does not appear here.

This court has had occasion several times to consider petitions of this kind, and it has been many times held that unless the petition clearly shows an ordinance creating the position in question the petitioner will not be entitled to the ^{writ} of mandamus. Among the many cases so holding are, Moon v. Mayor, 214 Ill. 40; Bullis v. City, 236 Ill. 472; People ex rel. Hickland v. City, 196 App. 48; Vaughn v. City, No. 21069, this court, opinion filed February 16, 1916, and cases cited.

~~Petitioner in the case before us does not set forth any ordinance creating the position of detective sergeant. What was said in the Hickland case, supra, with reference to the ordinances touching the position of police~~

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patrolman is applicable to the instant case.

[The petition further alleged that on August 11, 1913, charges were made against petitioner and delivered to him; that he was charged with having been guilty of conduct unbecoming a police officer, and also wilful maltreatment of a citizen; that the trial before the Civil Service Commission was set for August 20, 1913, and that he attended upon that day, but that the Commission did not hold a session; that on September 3, 1913, in the absence of the petitioner, the trial board met and he was found guilty upon the charges made, and an order was entered that he be discharged from the police department.]

So far as appears from the petition the hearing of the charges was continued from the day first set, that is, August 11th, until September 3rd, at which time it was the petitioner's right, if he so desired, to appear and defend. In the absence of any averment to the contrary we will assume that this is what was done and that the proceedings were properly conducted.

We cannot review the findings of the Civil Service Commission upon the questions of the innocence or guilt of the petitioner. Sullivan v. Lower, 234 Ill. 21.

Petitioner was discharged from the service on September 3, 1913, but did not file his original petition for mandamus until July 1, 1914, and the present amended petition until April 17, 1915. It has been held that a delay of six months in filing such a petition amounts to laches, and that laches, when shown, is a sufficient defense. Kenneally v. City, 230 Ill. 485; Schultheis v. City, 240 Ill. 167; Clark v. City, 233 Ill. 113.

For the reasons above indicated the judgment of

patrolman in up the instant case. The police in Chicago engaged him on August 11, 1913, on charges which were later determined to be unfounded. He was charged with carrying a concealed weapon, with carrying a police officer, and with violating police laws. He was a citizen; he was a police officer and civil service Commission was set for August 31, 1913, and was he attended upon that day, but the Commission did not hold a session; that on September 11, 1913, in the absence of the Commission, the trial was held and the defendant was found guilty of the charges made, and an order was entered that he be discharged from the police service.

To the Commission the defendant was discharged from the police service. The Commission was composed of the Mayor, the Police Board, and the Police Commissioner. The Commission was held on September 11, 1913, and the defendant was found guilty of the charges made, and an order was entered that he be discharged from the police service.

The Commission was composed of the Mayor, the Police Board, and the Police Commissioner. The Commission was held on September 11, 1913, and the defendant was found guilty of the charges made, and an order was entered that he be discharged from the police service. The Commission was composed of the Mayor, the Police Board, and the Police Commissioner. The Commission was held on September 11, 1913, and the defendant was found guilty of the charges made, and an order was entered that he be discharged from the police service.

the Circuit Court is reversed and the cause is remanded with directions to enter an order sustaining the demurrer of the defendants and dismissing the petition.

REVERSED AND REMANDED
WITH DIRECTIONS.

the Circuit Court is referred and the cause is remanded
with directions to enter an order sustaining the demurrer
of the defendants and dismissing the petition.

DEMANDS ARE GRANTED
WITH COSTS.

84 - 22502

RICHARD F. LILLIS,
Defendant in Error,

vs.

CITY OF CHICAGO,
Plaintiff in Error.

203 I.A. 193

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE MCSURLEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover damages for injuries received through a defective sidewalk, upon trial by a jury had judgment for \$800.

The accident ^{was} ~~is~~ stated to have occurred on or about May 3, 1914, and the first statement of claim was filed within the year thereafter; on Jan. 15, 1916, it was stricken from the files and a new statement of claim filed. It ^{was} ~~is~~ urged that this second statement stated a new cause of action, and that at the time of filing it, the statutory limitation of one year had run.

After verdict and before judgment a third statement of claim was filed, and it is said that this presented a new issue which should have been submitted to a jury.

Neither the evidence nor the proceedings have been preserved for our review by bill of exceptions or otherwise. In this condition of the record we cannot review the actions of the court upon motions (see Mann v. Brown, 263 Ill. 394), and we must assume the sufficiency of the evidence to support the verdict under either of the three statements of claim.

However, we are of the opinion that the first statement of claim contains an imperfect statement of a cause of action, and that the second statement states the same action-

able cause with more particularity. Under such circumstances the statute had not run against the plaintiff.

The third statement of claim did not describe a new or different tort from that alleged in the previous statements of claim. No evidence could have been introduced thereunder which would not have been admissible under either of the prior statements of claim.

There is no substantial merit in the contentions of defendant, and the judgment is affirmed.

AFFIRMED.

and cause with more particularity. But such circumstances

the statute had not run against the plaintiff.

The third statement of claim did not describe a new

or different sort from that alleged in the previous statements

of claim. No evidence could have been introduced thereunder

which would not have been admissible under either of the prior

statements of claim.

There is no substantial merit in the contention

of defendant, and the judgment is affirmed.

APPEAL.

88 - 22507

F. MAYER BOOT & SHOE
COMPANY,

Plaintiff in Error,

vs.

F. GRYGIERCZYK and F. LUBA,
co-partners, trading as
Grygierczyk & Luba Co.,

Defendants in Error.

203 I.A. 194

Error to

Municipal Court

Of Chicago.

MR. PRESIDING JUSTICE MESURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on two notes executed by the defendants to the order of plaintiff, dated October 1, 1914, the first note for \$54.03, due November 20, 1914, the second note for \$54, due December 20, 1914, both drawing interest at the rate of 7 per cent. per annum from date until paid.

Upon trial by the court judgment was entered for \$29.90, which plaintiff by this writ of error seeks to have reversed, claiming that it is entitled to judgment for the full amount of the notes, with interest.

Defendants by their affidavit of defense asserted lack of consideration and also a release from all liability. The court, by entering judgment for the plaintiff, evidently found against these defenses. The defendants have assigned no cross-errors; hence the action of the court as to these defenses is not before us for review.

The defendants also asserted that they had paid the notes by making payments to an agent for the plaintiff, for which plaintiff credited these defendants on its books. We are of the opinion that the evidence does not establish the defense of payment. It appears that plaintiff was manufacturing shoes in Milwaukee, Wisconsin; that one of its agents

W. MILES BOOT & SON,
JEWELLERS,
10, NEWBURY STREET, LONDON, W.1.

Reference to Order

vs.

F. GYGIENOWSKI and T. KURA,
co-partners, trading as
Gygiensky & Kura Co.,
Defendants in Error.

THE COURT OF APPEALS
IN CIVIL APPEALS

The first issue for consideration is whether the first note for £500.00, dated November 10, 1914, was a valid note for £500.00, and whether the second note for £500.00, dated November 10, 1914, was a valid note for £500.00. At the date of the first note, the second note was not valid. Upon trial by the court, judgment was entered for 1914, which plaintiff by this writ of error seeks to have reversed, claiming that it was a judgment for an amount in excess of the notes, and that the defendant by its affidavit of defence, admitted lack of honest belief. The court, by its judgment, found for the plaintiff, and it is found that the defendant's defence was not a proper one; hence a claim of the plaintiff is not before us for review.

The defendant also attacked the first note by saying that it was a note for £500.00, which plaintiff admitted, but that the defendant's defence was not a proper one; hence a claim of the plaintiff is not before us for review.

was a Mr. Lippert, in Chicago; that the defendants were purchasing shoes from plaintiff through its agent, Lippert; that in April, 1914, defendants received a letter from plaintiff requesting that whenever bills became due for shoes remittances should be sent direct to the plaintiff in Milwaukee, and adding: "You are to pay no money to any agent or representative of this company except on written authority." Similar notices were sent in May, June and July. In spite of these notices defendants made certain payments to Lippert aggregating \$106.52, which with interest amount to \$108. 03. This was the situation on October 1, 1914. Apparently it was brought to the attention of defendants that they had made these payments to Lippert contrary to instructions from the plaintiff, and an agreement was made which involved the execution of the two notes in question and the undertaking by defendants to recover from Lippert the money they had improperly paid to him.

These facts fail to establish the defense of payment. Defendants were clearly liable for the amount upon their account, and the postponement of payment was a good consideration to support the notes.

Plaintiff is entitled to judgment for the amount of the notes with interest, which is \$125.19. The judgment is reversed, and judgment for plaintiff will be entered in this court for \$125.19.

REVERSED AND JUDGMENT HERE.

was a Mr. Lighter, in 1934; that the defendant was then
operating a business through the agent, Lighter; that
in April, 1934, defendant received a letter from Lighter
requesting that defendant make a loan for some reason
should be sent along to the defendant in 1934, and that
defendant: "You are to pay no money to me, but on representative
of this company expect me to be 'working'." Defendant
were sent in 1934, and defendant, in 1934, of these reasons
defendant made certain payments to Lighter, amounting to \$100.00,
which with the rest made up \$100.00. This was the situation
on October 1, 1934. Apparently it was decided to the effect
of defendant that there was a loan from defendant to Lighter, and
truly to in 1934, from the defendant, and an agreement was
made which involved the payment of the two notes in question
and the undertaking by defendant to recover from Lighter the
money they had improperly paid to him.
These facts fail to establish the charges of Lighter.
Defendant were clearly liable for the amount upon their ac-
count, and the possession of defendant was a good cause of action
to support the action.
Lighter is entitled to make out for the court of
the not a valid interest, and in 1934. The defendant is
reversed, and Lighter and for defendant will be ordered to pay
court for \$100.00.

92 - 22512.

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|--|----------------|-------------------|
| ANDREW JACKSON,
Defendant in Error, | } 203 I.A. 196 | |
| vs. | | } Error to |
| WILLIAM A. BURNS, et al.
(Defendants) | | } Municipal Court |
| WILLIAM A. BURNS,
Plaintiff in Error. | | } of Chicago. |

MR. PRESIDING JUSTICE MESURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against Burns and W. Tudor ApMadoc to recover for damages to plaintiff's automobile received in a collision caused, as plaintiff alleged, through the carelessness and improper management of defendants' respective automobiles. Upon trial by the court ApMadoc was found not guilty, Burns was found guilty, and plaintiff's damages were assessed at \$285 and judgment against Burns entered on the finding. The defendant Burns, in this court, asks that this judgment be reversed.

Two grounds for reversal are asserted - first, that the statement of claim fails to set forth a cause of action. It is not necessary to consider whether the statement is sufficient upon a motion to strike, but only whether it states a case sufficient after verdict to support the judgment. As is quoted with approval from Chitty, in C. & E. I. R. R. Co. v. Hines, 132 Ill. 161, the rule is:

"Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect,

196

LEADERS, JAMES, et al.,
Defendants in Error,

vs.

vs.

Original Court
of Chicago.

WILLIAM A. BURNS, et al.,
(Defendants)

WILLIAM A. BURNS, et al.,
Plaintiffs in Error.

THE HONORABLE JUSTICE OF THE PEACE
OF THE COUNTY OF CHICAGO.

Allegation made in said original court.

Allegation to recover for damages to plaintiff's automobile
received in a collision caused, a defendant alleged, through
the carelessness and improper management of defendant's re-
spective automobiles. Upon trial by the court plaintiff was
found not guilty, hence no longer entitled to damages.
Damages were assessed at \$1000 and judgment of that amount
entered on the first day of the defendant's term, in this court,
make that this judgment be reversed.

The court on reversal was reversed - three, that
the statement of said facts to set aside a case of law.
It is not necessary to consider whether the defendant is not
liable under a motion to revise, but only whether it is not
a case sufficient to warrant a reversal and judgment.
It is proved with a copy of the first day of the first term
v. Hines, for the first day of the first term.

There is no case, however, upon which an opinion
in any circuit, whether in the first or second, or in
would have been a final order of the court, but it
two have found no case in the first or second, or in
trial, upon the issue of whether the defendant is not
liable or liable, and without which it is not to be
served upon either the judge or the jury, to give
or the jury could have, then, the verdict, and the

2.

imperfection or omission is cured by the verdict."

And in Chicago City Ry. Co. v. Jennings, 157 Ill. 274, it is held that it is not necessary to specify the acts which constitute negligence.

Plaintiff's statement of claim alleged that Burns so negligently, recklessly and improperly ran his automobile that as a direct result thereof the automobile of ApMadoc and the automobile of plaintiff were brought into violent collision. Defendant Burns by his affidavit of defense denied that he so operated his automobile that, either directly or indirectly, he caused any other automobile to come in contact with or be the proximate cause of any collision between plaintiff's automobile and any other automobile. Defendant did not ask for a more particular statement of claim but joined issue upon the essential fact of his negligence causing the damage to plaintiff's automobile. He cannot now be heard to complain of the insufficiency of the statement of claim.

"After judgment, the rule by which pleadings before judgment are construed most strongly against the pleader is reversed and the pleading upon which the judgment is based is liberally construed for the purpose of sustaining the judgment. * If the statement of claim filed in this cause stated a cause of action, however defectively or imperfectly, and the issue joined was such as necessarily to require proof of the facts defectively stated, it would be sufficient." Plew v. Board, 274 Ill. 232.

The second matter asserted as a ground for reversal is that the conduct and management of defendant's car was not the proximate cause of the injury. Stated briefly, the evidence tended to show that the defendant Burns came into Michigan Boulevard from a cross street at a high rate of speed, and ApMadoc's automobile, in veering away to avoid

3.

Burns' automobile, collided with plaintiff's car.

We hold that defendant did more than simply cause a condition in which ApMadoc's chauffeur acted negligently. Whether or not ApMadoc's chauffeur acted with the highest degree of wisdom and judgment does not affect the fact of defendant's primary liability for his own conduct. He was responsible for starting in operation a series of events which resulted in damage to the plaintiff. In this respect the facts in this case are like those before this court in Page v. Brink's Chicago City Express Co., 192 Ill. App. 389, in which we held the defendant liable. The evidence justified the court in the conclusion that the defendant's negligent operation of his automobile was the proximate cause of the damage to plaintiff's car.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

burns, and possibly, collected in a limited way.

The fact that the defendant was not a party to the

a condition in which the defendant's character was not

whether or not the defendant's character was not

degree of which the defendant was not

defendant's and not the defendant's own

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the fact in which the defendant's character

Page v. Smith's Lumber Co., 101 Cal. 2d, 322.

in which the defendant's character

testified the defendant's character

negligent operation of the defendant's

cause of the damage to the defendant's

for the reason that the defendant's

affirm.

101 Cal. 2d, 322.

TONY ROSETTI and VINCENT
MANNO, copartners, trading
as Tony Rosetti & Co. Labor
Agency,

Defendants in Error.

vs.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY, a corporation,
et al.,

Plaintiffs in Error.

203 I.A. 200

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit alleging that they conducted a licensed labor agency and that the defendant, Chicago, Rock Island & Pacific Railway Company, contracted with them to furnish laborers, whom defendant agreed to employ and furnish transportation. Plaintiffs furnished the men as agreed upon, but defendant failed to employ them and furnish transportation, resulting in loss to plaintiffs. Under instructions from the court the jury returned a verdict for plaintiffs in the sum of \$86 and judgment was entered thereon.

Defendant asserts that no contract was made with reference to these laborers, but to this we cannot agree. The evidence shows that an agent of the defendant at Manly, Iowa, wrote to plaintiffs that he could use "thirty Greeks at Mason City, Iowa, at once," and that transportation would be furnished by the superintendent at Chicago. To the same effect was another letter for thirty men from the superintendent at Cedar Rapids. The letters are explicit as to terms and details of employment, and constitute a contract binding upon the defendants.

From the evidence the court could properly find that of the sixty men furnished by plaintiffs and tendered to defendants only seventeen were accepted and furnished transportation; forty-three were refused. Plaintiffs, as permitted by statute (act relating to private employment agencies, chap. 48 Murd), ^(G. & A. 5322 et seq.) had collected a registration fee of two dollars from each of these laborers, which the action of the defendants in failing to keep its agreement compelled plaintiffs to return. It is argued that as the evidence tends to show that the names of these refused laborers were not actually placed on the register plaintiffs were not entitled to the registration fee. We think it is clear from the language of the statute that the names placed upon the register shall be the names of every "accepted application for employment." If defendants had complied with their agreement to take these men their names would have been placed upon the register in proper form, and plaintiffs would have been entitled to retain the two dollar registration fee as their compensation. Defendants' failure to take the men deprived plaintiffs of their compensation, and we do not see how it can avail defendants to assert that the names in fact had not yet been formally registered.

Matters urged with respect to non-compliance by plaintiffs with the requirements of the statute are not available as defenses in this suit.

No justification for defendants' failure to comply with its undertaking has been shown, and the judgment is affirmed.

AFFIRMED.

From the evidence the court could properly find

that of the sixty men furnished by plaintiffs and tendered

to defendants only seventeen were accepted and furnished

transportation; forty-three were returned. Plaintiffs, as

permitted by statute (act relating to private employment

agencies, chap. 48, 1904) had collected a registration fee

of two dollars from each of these men, which the ac-

tion of the defendants in failing to keep the agreement

compelled plaintiffs to return. It is argued that as the

evidence tends to show that the names of these returned

laborers were not actually placed on the register plain-

tiffs were not entitled to the registration fee. We think

it is clear from the language of the statute that the names

placed upon the register shall be the names of every "ac-

cepted application for employment." If defendants had com-

plied with their agreement to take these men their names

would have been placed upon the register in proper form,

and plaintiffs would have been entitled to retain the two

dollar registration fee as their compensation. Defendants'

failure to take the men deprived plaintiffs of their compen-

sation, and we do not see how it can be said defendants do

assert that the names in fact had not been formally

registered.

Plaintiffs argued with respect to the compensation of

plaintiffs when the requirements of the statute are not

available as defenses in this suit.

No justification for defendants' failure to comply

with its undertaking has been shown, and the judgment is af-

firmed.

APPEAL.

109 - 22532.

203 I.A. 202

| | | |
|---------------------|---|-----------------|
| CITY OF CHICAGO, |) | Error to |
| Defendant in Error, |) | |
| vs. |) | Municipal Court |
| FRED SMITH, |) | of Chicago. |
| Plaintiff in Error. |) | |

MR. PRESIDING JUSTICE MESURELY
DELIVERED THE OPINION OF THE COURT.

Defendant, charged with keeping a common gaming house in Chicago, was tried by the court, found guilty and fined \$50. By this writ of error he seeks to have this judgment reversed upon the ground that it is not supported by the evidence.

Plaintiff says that this court cannot consider the evidence for the reason that it has not been properly preserved for review. Upon investigation we are of the opinion that the contention of the plaintiff is valid. This is a case of the 5th class, and section 23 of the Municipal Court act prescribes how the evidence in a case of this sort shall be preserved. It may be done by a correct statement of the facts. This does not purport to be such a document, and in fact it is not. Neither is it a correct stenographic report of the proceedings at the trial; it does not purport to be a correct stenographic report nor to contain all the evidence presented upon the trial.

Even if we should consider the document before us as a stenographic report or statement of facts, there is a manifest omission from the record which would compel an affirmance. It appears that defendant was charged with having violated an

2081A.203

CITY OF CHICAGO,
Defendant in Error,
vs.
FRANK MALKIN,
Plaintiff in Error.

THE HONORABLE JUDGE OF THE COURT
IN CHARGE OF THE COURT

Defendant, appeared for trial in the
house in Chicago, and tried by the jury, and
found guilty. The jury with a verdict to have this
judgment reversed upon the ground that the evidence
by the evidence.

Plaintiff says that the evidence
evidence for the reason that it has not been
served for review. Upon review for review, it is
that the evidence of the defendant is not
case of the defendant, and the evidence of the
not presented for review, and the evidence of the
be preserved. It is not the duty of the court to
test, this does not amount to a reversal of the
test it is not. It is not the duty of the court
of the defendant of the evidence; it is not the duty
correct. Accordingly, it is not the duty of the court
presented upon the evidence.

There is no evidence of the defendant
a defendant, and the evidence of the defendant
test evidence for the reason that the evidence of the
is apparent and apparent, and the evidence of the

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ordinance of the City of Chicago and was found guilty. This ordinance does not appear in any place before us in the record. Under such circumstances it is our duty to presume that the facts as to the ordinance which are omitted from the record were sufficient to justify the finding of the court. In so holding we are in accord with the decisions of this court in City v. Tearney, 187 Ill. App. 441; City v. Moran, 192 id. 57; City v. Kohn, 195 id. 399; City v. Lesser, 196 id. 37.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

ordinances of the City of Chicago and was found guilty. This ordinance does not appear in any place before us in the record. Under such circumstances it is our duty to presume that the facts in the ordinance which are omitted from the record were sufficient to justify the finding of the court. In so holding we are in accord with the decision of this court in City v. Tennyson, 197 Ill. App. 441; City v. Foxen, 198 Ill. 67; City v. ..., 199 Ill. 15. 199; City v. Tennyson, 198 Ill. 67.

For the reasons indicated the judgment is affirmed.
 AFFIRMED.

110 - 22533

CITY OF CHICAGO,
Defendant in Error,
vs.
TOM JONES,
Plaintiff in Error.

203 I.A. 203
ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is another case wherein the defendant was found guilty of engaging in gambling in violation of a city ordinance of Chicago.

What we have said in our opinion in City v. Smith, No. 22532, this day filed, is applicable to the instant case. The evidence has not been properly preserved for review, and even if we should examine it, the ordinance in question, of which the trial court took judicial notice and of which we cannot, has not been preserved in the record. As we have heretofore held in many cases, in the absence of the ordinance we must presume that the trial court was justified in its finding and judgment.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

208 A 1912

REPORT TO THE JUDICIAL COURT

OF CHICAGO.

CITY OF CHICAGO,
Defendant in Error,

vs.

TOM JONES,
Plaintiff in Error.

THE JUDICIAL COURT OF CHICAGO
DELIBERATED THE OPINION OF THE COURT.

This is another case wherein the defendant was found guilty of engaging in violation of a city ordinance of Chicago.

What we have said in our opinion in City v. Smith, No. 22523, this day filed, is applicable to the instant case. The evidence has not been properly served for review, and even if we should examine it, the ordinance in question, of which the trial court found judicial notice and of which we cannot, has not been served in the record. As we have heretofore held in many cases, in the absence of the ordinance we must presume that the trial court was justified in its finding and judgment.

For the reasons indicated the judgment is

affirmed.

ATTEST.

203 I.A. 204

WALTER RUTKOWSKI by MARY
LANDOWSKI, next friend,
Defendant in Error,

Error to

Municipal Court

of Chicago.

vs.

CARL MARCOWSKA,
Plaintiff in Error.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging malicious prosecution and false imprisonment. Statement of claim was filed October 25, 1915, and summons issued. On November 1, 1915, default was entered against the defendant for failure to enter his appearance. On November 8th, before a hearing and judgment were had, defendant filed his appearance, and on the 10th an affidavit of defense. On December 21st, without notice to the defendant, the trial court entered an order striking the appearance and affidavit of defense from the files, and the case was tried by a jury in the absence of the defendant or his attorney. Verdict was returned assessing plaintiff's damages in the sum of \$500, and judgment was entered on the verdict. Defendant contends in this court that the judgment must be reversed for the reason that the statement of claim filed by the plaintiff does not state a cause of action.

In an action to recover damages for malicious prosecution it is essential to allege, among other things, the absence of probable cause and the termination of the original proceedings in favor of the plaintiff. Daily v. Donath, 100 Ill. App. 52; Wicker v. Hotchkiss, 62 Ill. 107. Neither of these allegations is made by the plaintiff in the statement before us.

Gillman v. Chicago Rys. Co., 268 Ill. 305, is authority for holding that in a case of this sort the defendant is not bound to answer a claim which does not show any liability

2081A 204

WALTER RUTKOWSKI by MARY
LANDOWSKI, West 21st St.,
New York 11, N.Y.

vs.

vs.

CARL MARONOFF,
Defendant.

Plaintiff.

Plaintiff's Exhibit No. 1
Exhibit No. 1 of Plaintiff's Exhibit

Plaintiff brought this alleged malicious prosecution
and false imprisonment. Statement of claim was filed October
22, 1915, and summons issued. On November 1, 1915, defendant
was ordered against the defendant for failing to enter his
appearance. On November 23rd, before a hearing and judgment
were had, defendant filed his appearance, and on the 14th of
affidavit of defense. On December 11th, various notices to the
defendant, the trial court entered an order requiring the ap-
pearance and affidavit of defense from the files, and the
case was tried by a jury in the absence of the defendant of his
attorney. Verdict was returned assessing damages to the value of
in the sum of \$1,000. Judgment was entered on the verdict.
Defendant moved to set aside the verdict and judgment and for a
verdict for the reason that the case was a malicious prosecution
plaintiff does not have a cause of action.
In an effort to remove the case from the jurisdiction of the
court it is requested to allege, remove the case from the
of probable cause and the fact that the defendant was not
in favor of the plaintiff. Walter v. Rutkowski, 100 N.Y. 201.
Walter v. Rutkowski, 100 N.Y. 201. The court there stated
is made by the plaintiff in the order of removal.
Walter v. Rutkowski, 100 N.Y. 201. It is reported
it for holding that in a case of a malicious prosecution the
not found to have a cause of action which would entitle him to a

against him, and hence cannot be in default. This case is also authority for holding, as we do, that the statement before us is fatally defective by reason of the omission of the essential allegations above referred to. This same case is also authority for holding that this insufficiency of the statement was not waived by the failure of the defendant to move for a more specific statement. In the opinion the court says: "The statement stands for a declaration in common law actions. It is essential to sustain the judgment. The rule is well settled that if a declaration is so defective that it will not sustain a judgment the insufficiency may be availed of on a writ of error even after a demurrer overruled and a plea to the merits."

It follows from what we have said that the judgment must be reversed, and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT HERE.

[illegible]

RAY F. DELONG and JAMES
F. COLLINS

Appellees.

vs.

THOMAS J. HRUBY,

Appellant.

203 I.A. 206

APPEAL FROM COUNTY COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit against defendant and upon trial had judgment for \$500, from which defendant has appealed.

This appeal should be dismissed for the reason that defendant has not filed a proper abstract of the record. What purports to be an abstract is merely an index. ^{was} The declaration ~~is~~ merely described as "Harr. Filed by and in name of Ray F. DeLong alone. Common counts, unverified." Then follows: "Pleas of defendant, 1st, General issue; second, On July 2, 1914, plaintiff by his deed bearing date of that day, released defendant. Affidavit of meritorious defense." ^{There were also} Similar other deficiencies in the abstract ^{might be quoted.} See notable opinion by Mr. Justice Gary in Bishop v. Loewus, 63 Ill. App. 351. In the absence of a sufficient abstract of the record the judgment must be affirmed.

Another conclusive reason for affirmance lies in the fact that all of the evidence introduced upon the trial is not before us in the record. A set of plans and a written document which were introduced in evidence are omitted from the bill of exceptions. We learn from the statement of counsel that plaintiffs' suit was to

3081 A. 308

WILLIAM J. BERRY, JR.

NEW YORK, N.Y.

MAY 11, 1961

NEW YORK, N.Y.

NY

THOMAS J. BERRY, JR.

NEW YORK, N.Y.

RE: WILLIAM J. BERRY, JR.

NEW YORK, N.Y.

Upon this and the other facts, the court has concluded that the defendant's appeal should be denied.

This court should be advised of the reason

that the defendant has not filed a proper motion for

reconsideration. The court has reviewed the

record and the defendant's motion for reconsideration.

The court has reviewed the record and the defendant's

motion for reconsideration. The court has reviewed the

record and the defendant's motion for reconsideration.

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record and the defendant's motion for reconsideration.

recover a balance of \$500 of a deposit of \$1,500 made by them with defendant under an agreement for a lease of a building to be erected by the defendant. Plaintiffs introduced evidence tending to show that this agreement was canceled by mutual consent of all the parties, including the defendant, who agreed to refund to plaintiffs the deposit money; that \$1,000 of the same was paid and that defendant agreed to pay the balance of \$500 either in cash or by conveying a lot to plaintiffs; that the defendant failing to give the lot, plaintiffs were entitled to recover the balance of the deposit money. In the absence of a complete bill of exceptions showing all of the testimony and evidence submitted to the jury, we must presume that the jury was justified from the evidence in finding that plaintiffs had established their claim. Therefore, even if we had before us a proper abstract, the judgment should be affirmed.

AFFIRMED.

should be affirmed.

OWEN KELLY,
Defendant in Error,

vs.

GREAT LAKES DREDGE & DOCK
COMPANY, a corporation,
Plaintiff in Error.

203 I.A. 207

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant brings this writ of error to review a judgment against it of \$488.20 entered on the finding of the trial Judge, to whom the cause was submitted by the agreement of the parties.

Plaintiff alleges in his statement of claim that he was a "caisson worker and digger" and that defendant, through its accredited representative, agreed to give him employment as such worker and digger for one year at a wage of \$37.95 per week, and that he continued in such employment until December 21, 1914, when he was discharged without cause. He claimed as damages the difference between what he received under the contract and was otherwise able to earn during the contract period and the sum he would have received at the contract rate but for his discharge, amounting to \$494.20. Defendant in its affidavit of meritorious defense denied the making of the contract alleged. Plaintiff testified that he made his contract of employment with William Murphy, the superintendent of defendant, whom plaintiff called as a witness under Section 33 of the Municipal Court Act; that on or about October 6, 1914, he, with other men, had a conversation with Murphy in which all the men told Murphy that they wanted to find

out about organizing a "branch of the union" for themselves; that they were "up against" the union, and that Murphy said, "If you will stay with me I will stick with you. I will guarantee you a year's work without a cut of wages." Whereupon Mike Dolan and Peter Merren answered, "Enough said," and Dolan shook hands with Murphy. There had theretofore been a strike of the Hod Carriers' Union, in which plaintiff was involved and "went out" with the other union men, but subsequently returned; and it was to guard against union disfavor that plaintiff and others had the talk with Murphy which resulted in the contract which plaintiff seeks to enforce against defendant. At the time of this talk plaintiff was receiving \$4.60 per day, which was the union scale. Other witnesses corroborated plaintiff's version of the contract. Waiving the dispute as to Murphy's authority to make the contract sought to be enforced, and not disputing what Kelly and the other men testified to took place between Kelly, the other men and Murphy, the questions remain - Did it amount to an enforceable contract? Is it a bilateral or a unilateral agreement? In law, were both sides to the contract bound or only one? We cannot say that the agreement, claimed to exist by virtue of the words and actions of the parties as related by the several witnesses, contained mutual or reciprocal conditions. The men were not bound; according to their own version they could quit working for defendant at any time they saw fit. They were before and at the time of the talk above recited working for defendant by the day and were paid for each day's work. They were never paid for days which they did not work and many days they were laid off because of weather conditions. We hold that the agreement sought to be en-

out about organizing a "division of the labor" among the
 that they were "up against" the Union, and to a large extent
 "If you will stay where I will talk with you." With
 guarantee you a year's work, placed a lot of money. "I
 upon the Union and later I was employed. "I was paid
 and Dolan took home with him. There had been one
 been a strike of the two last year, in which Dolan
 till was leaving and "went out" in the early morning,
 but apparently returned; and I was to meet Dolan
 Union district was plaintiff and I was to be paid for
 largely which resulted in the contract, which I was to
 to enforce the contract. I was to be paid for this
 plaintiff was receiving \$4.00 per day, which was the Union
 equal. I was to be paid for the plaintiff's version
 of the contract. I was to be paid for the plaintiff's
 answer to the contract. I was to be paid for the contract,
 not dispute the contract. I was to be paid for the contract,
 took it to Dolan Kelly, and I was to be paid for the contract,
 questions to him - and if I was to be paid for the contract,
 it is a dispute of a contract and I was to be paid for the contract,
 both of which the contract is not to be paid for the contract,
 say that I was to be paid for the contract, and I was to be paid for the contract,
 words and actions of the Union and I was to be paid for the contract,
 witnesses, I was to be paid for the contract, and I was to be paid for the contract,
 and were to be paid for the contract; and I was to be paid for the contract,
 could it be paid for the contract? and I was to be paid for the contract,
 they were to be paid for the contract, and I was to be paid for the contract,
 saying that the fact that the contract was to be paid for the contract,
 say, more. I was to be paid for the contract, and I was to be paid for the contract,
 not work in any way in the contract, and I was to be paid for the contract,
 conditions. I was to be paid for the contract, and I was to be paid for the contract.

forced is unilateral, lacks mutuality, and is consequently unenforceable. Cincinnati Exhibition Co. v. Johnson, 190 Ill. App. 630; Ulrey v. Keith, 237 Ill. 284.

The judgment of the Municipal Court is reversed and a judgment of nil capiat and for costs will be entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT
AND FOR COSTS ENTERED HERE.

Ylloppeet 100 si ha, 100 luntan 1000, 1000 luntan 10000

SECRET

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Persons of this class not to be subject in to punishment & fine

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Figure 1. The effect of the concentration of the *Agaricus bisporus* spores on the growth of *Agaricus bisporus* on the substrate.

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MINNA SPRENGEL,
Defendant in Error,

vs.

ARTHUR SCHROEDER, Administrator
de bonis non with the will an-
nexed of the Estate of HENRY
HOCHBAUM, deceased,
Plaintiff in Error.

203 I.A. 213

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for re-
view the record of the trial of this cause in the Superior
court terminating in a judgment entered upon the verdict
of a jury after the overruling by the trial Judge of mo-
tions for a new trial and in arrest of judgment of \$4000.
to be paid in due course of the administration of the
testator's estate.

[The accident to plaintiff, damages for which
are sought to be recovered in this action, happened by her
falling through a trap door left open by defendant's
testator. The declaration consists of two counts, in the
first of which Henry Hochbaum was alleged to be in "possession
and control" of the building of which the trap door was a
part, and that plaintiff's husband was a tenant in said
building, where plaintiff and her family resided; that
Hochbaum negligently caused a certain trap door in the
sidewalk in front of said premises to be and remain open,
rendering said sidewalk not reasonably safe for plaintiff
and others going to and from the tenements in said building,
and that plaintiff while exercising ordinary care and caution
on her part stepped into said trap door left open by reason

2021.1.213

ERROR TO SUSTAIN COURT

OF COOK COUNTY.

MINNA BREWSTER,
Defendant in Error,

vs.

ARTHUR SCHROEDER, Administrator
of the Estate of HENRY
HOCHBAUM, deceased,
Plaintiff in Error.

MR. JUSTICE HOLCOM DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for re-

view the record of the trial of this cause in the Superior
court terminating in a judgment entered upon the verdict
of a jury after the overruling by the trial judge of re-
fuses for a new trial and in extent of judgment of \$4000.
to be paid in the course of the administration of the
testator's estate.

The accident to plaintiff, damages for which

are sought to be recovered in this action, happened by her

falling through a trap door left open by defendant's

testator. The declaration consists of two counts, in the

first of which Henry Hochbaum was alleged to be in "possession

and control" of the building of which the trap door was a

part, and the plaintiff's husband was a tenant in said

building, where plaintiff and her family resided; that

Hochbaum negligently caused a certain trap door in the

sidewalk in front of said premises to be and remain open,

rendering said sidewalk not reasonably safe for plaintiff

and others going to and from the premises in said building,

and that plaintiff while exercising ordinary care and caution

on her part stepped into said trap door left open by reason

of Hochbaum's negligence, and fell, receiving severe bodily injuries, internal, external, permanent and otherwise, etc. The second count ^{was} ~~is~~ similar to the first, but alleged that plaintiff was a tenant of Hochbaum. To this declaration three pleas were filed - one the general issue, the second denying that Hochbaum owned or controlled the premises of which the trap door was a part, and the third denying that Hochbaum left open the trap door, etc.]

On motion the second and third pleas were stricken from the files. The exception to the court's action in so doing is found in the record and not in the bill of exceptions. While the two pleas so stricken were properly stricken, the matters denied therein stood sufficiently denied in law by the plea of the general issue, and were therefore superfluous pleadings. Furthermore, the exception to the court's action cannot be availed of because it is not preserved in the bill of exceptions. Plaintiff likewise excepted to the ruling of the court in overruling the motion for a new trial and in arrest of judgment and in entering judgment upon the verdict. These exceptions are found in the record but not in the bill of exceptions, where they belong; they are in the wrong place and cannot therefore be availed of upon review. Mann v. Brown, 263 Ill. 394.

We might rest here and affirm the judgment, but we will not do so without passing upon the merits of the claim and the correctness of procedure, both of which defendant challenges by assignment of errors and in argument.

It is admitted that plaintiff had at the time of the action occupied the premises for sixteen years, and it is proven by evidence which is not denied that plaintiff

of Hochbaum's negligence, and left, receiving severe bodily injuries, internal, external, permanent and otherwise, etc. The second count is similar to the first, but alleges that plaintiff was a tenant of Hochbaum. To this recitation three pleas were filed - one a general denial, the second denying that Hochbaum owned or controlled the premises of which the trap door was a part, and the third denying that Hochbaum left open the trap door, etc.

On motion the second and third pleas were stricken from the files. The objection to the counts in so doing is found in the record and not in the bill of exceptions. While the two pleas of stricken were properly stricken, the matters denied therein could still be clearly stated in law by the plea of the general denial, and were therefore superfluous pleadings. Furthermore, the exception to the counts cannot be waived or become it is not preserved in the bill of exceptions. Plaintiff likewise objected to the ruling of the court in sustaining the motion for a new trial and the motion was denied. In entering judgment on the verdict, the court found in the record that it is the duty of the jury to find they believe; that the evidence is not sufficient to believe be avoided; or, provided, that the jury believe, etc. We will not be so strict as to require the jury to believe claim and the correctness of evidence, but it is the duty of the jury to believe by an act of belief and not by a finding. It is stated that the evidence is not sufficient to believe of the action occurred, the parties to the action, and it is proven by evidence which is not stated that plaintiff

had paid to Hochbaum rent which Hochbaum received as such. It was not necessary to prove title in Hochbaum, as that was not made an issue by the pleading.

It is alleged and proven that Hochbaum was in possession and control of the premises and that he negligently caused the offending trap door to be open at the time of the accident, when it should have been closed. The relation of the parties was that of landlord and tenant, and the duty of Hochbaum was the duty which a landlord owes to his tenant - to keep that portion of the premises which remained in his control and which was used in common by his tenants in a reasonably safe condition, and failure to do so involves the landlord in a liability for resulting injuries, where the injured person is in the exercise of ordinary care for his or her own safety. The trap door led to a portion of the premises used in common by the tenants and of which Hochbaum retained control. Payne v. Irwin, 144 Ill. 482.

The plea of the general issue admitted ownership and control. Carlson v. Johnson, 263 Ill. 556.

We think the evidence establishes that plaintiff was in the exercise of due care for her own safety at the time of the accident, as the law did not require her to be on the lookout for open trap doors, notwithstanding the fact may be that she knew of the existence of such trap door. Whether or not she was negligent in not observing that the trap door was open was a question of fact for the jury, and with their finding we have no disposition to interfere.

Defendant urges that the counts in the declaration are inconsistent in alleging in the one that plaintiff and in the other that her husband was the tenant of Hoch-

had paid to Hochbaum rent which Hochbaum was not to receive. It was not necessary to prove that Hochbaum was not made an issue by the plaintiff.

It is alleged and proven that Hochbaum was in

possession and control of the premises and that he negligently caused the offending trap door to be open at the time of the accident, when it should have been closed. The relation of the parties was that of landlord and tenant, and the duty of Hochbaum was the duty which a landlord owes to his tenant - to keep the portion of the premises which remained in his control and which was used in connection with the premises in a reasonably safe condition, and to insure to be so.

Where the injured person is in the exercise of ordinary care for his or her own safety, and the trap door fell from a portion of the premises used in a manner of the tenants and of which Hochbaum retained control. McLain v. Lewis, 144 Ill. App. 482. The time of the accident is not material.

Ship and control. Campbell v. Campbell, 185 Ill. 206.

He who has control of a premises is liable for

it if it was in the exercise of ordinary care for his or her own safety, and the trap door fell from a portion of the premises used in a manner of the tenants and of which Hochbaum retained control. McLain v. Lewis, 144 Ill. App. 482. The time of the accident is not material. Whether or not the trap door was open at the time of the accident is immaterial. The fact that the trap door was open at the time of the accident is immaterial. The fact that the trap door was open at the time of the accident is immaterial.

Defendant is liable for the damage caused by the

trap door falling on the plaintiff. McLain v. Lewis, 144 Ill. App. 482. The time of the accident is not material. Whether or not the trap door was open at the time of the accident is immaterial. The fact that the trap door was open at the time of the accident is immaterial.

baum. This is permissible under well settled rules of pleading, and it was proper that the cause should go to the jury under both of such counts, as the plaintiff was not required to elect on which of the counts she would rest her case. Luken v. L. S. & M. S. Ry. Co., 154 Ill. App. 550.

The proof shows that plaintiff as a result of falling through the trap door suffered an impacted fracture of the femur, with resultant permanent shortening of the leg and consequent disability, and defendant argues that such proof is not admissible under the averment in the declaration that plaintiff "received severe bodily injuries, internal, external, permanent and otherwise, which have from that time and will, for the rest of her life disable her from attending to her affairs and business," etc. We think this averment sufficient to admit proof of the injury suffered in this case by the fracture of the femur. City v. McLean, 133 Ill. 148. The averment is not specific but general, and is in this regard distinguishable from O'Connor v. Prendergast, 99 Ill. App. 531. An impacted fracture of the femur is, we think, clearly embraced within the averment that plaintiff suffered, among others, internal injuries. There was nothing in this averment to mislead defendant or to lead defendant to suppose that recovery was sought for any particularly named injury, as in the Prendergast case, supra; but, on the contrary, without asking for a bill of particulars or a more specific averment of particular injuries suffered, defendant must be held ready to meet any injury suffered which fairly comes within the meaning of the general words used in designating such injuries. As said in Fitzgerald v. City of Chicago, 144 Ill. App. 462, "We are of opinion that the averments of the declaration are broad

baum. This is particularly noted well advised rules of pleading
and it was proper that the cause should be so the jury under
both of such counts, as the plaintiff was not required to
elect on which of the counts she would rest her case. United
v. L. S. & L. Co., 104 Ill. App. 530.
The record shows that plaintiff's recovery was a result of
failing through the state bar admitted as a result of
of the board, with plaintiff's permission and consent of the
for and consideration. Plaintiff, who defendant argues that
such proof is not admissible under the evidence in this
decision that plaintiff recovered as a result of the injuries.
internal, external, physical and emotional, which arose from
that she and will be the result of her life disability and from
attending to her affairs and business," etc. We believe this
overment sufficient to establish proof of her injury suffered in
this case by the testimony of the board. Oliver v. Johnson,
133 Ill. App. 133. The evidence is not so clearly established, and
is in a state of discreditation as to be a result of the
fact, 20 Ill. App. 531.
and is, we think, a very material fact in the present case
plaintiff's evidence, being a fact, is not admissible. There
was nothing in this case to show that plaintiff's recovery was
defendant to any one but the jury was to be the jury.
ticular, a great injury, and the jury was to be the jury.
but, on a contrary, it is a fact, and the jury was to be the jury.
discipline was a necessary result of the fact, and the jury was to be the jury.
evidence, - defendant's evidence was to be the jury.
evidence which plaintiff offered was to be the jury.
words were in evidence and in evidence. 104 Ill. App. 531.
Marble v. City of Chicago, 144 Ill. App. 133. The fact of
opinion that the evidence of the defendant's recovery was a result of the

enough to make the testimony admissible," and the court did not err in refusing on defendant's motion to strike out the testimony regarding the fractured femur. The averment that plaintiff suffered from "external and internal injuries" is sufficiently broad to include any bodily injury of whatever character resulting from the accident about which plaintiff complained. L. S. & M. S. Ry. Co. v. Ward, 135 Ill. 511.

The hypothetical question put to plaintiff's attending physician stated the material facts fairly, no fact being omitted which was material, and no such omission was pointed out by the defendant when the objection was made, but on the contrary the objection to the question was made on the ground of omitted facts; but counsel when asked to specify any omitted fact failed to do so or to specify any fact omitted or any statement in such question which was not justified. Under the ruling in City of Alledo v. Honeyman, 208 Ill. 415, defendant cannot now be heard to complain that the hypothetical question was improper. Nor is there any force in the contention that the answer of this physician in any way invaded the province of the jury. While this witness gave his opinion upon the hypothetical question put to him, it still remained for the jury to determine the facts in evidence, including the probative value of the answer to the hypothetical question, and to test the weight of such evidence by the same rules as that of any other witness. In the Honeyman case supra the rule here applicable is thus stated:

"The rule applicable to hypothetical questions is, that the party seeking the opinion of the expert may, within reasonable limits, put his hypothetical case as he claims it has been proven and take the opinion of the witness thereon, leaving the jury to determine whether the case, as put, is the one proven."

Neither the question nor answer in dispute

enough to make the testimony admissible," and the court did not err in refusing on defendant's motion to strike out the testimony regarding the fractured femur. The evidence that plaintiff suffered from "external and internal injuries" is sufficiently broad to include any bodily injury of whatever character resulting from the accident except which plaintiff complained. A. B. & H. v. H. & H., 123 Ill. 311.

The hypothetical question put to plaintiff's attending physician stated the material facts fully, no fact being omitted which was material, and no error was pointed out by the defendant when the objection was made, but on the contrary the objection was overruled. On the ground of omitted facts, the court when asked to specify any omitted fact, failed to do so so timely and fact omitted or any statement in such case for which was not

justified. Under the rule in State v. Hoveman, 203 Ill. 415, defendant cannot now be heard to complain that the hypothetical question was improper. There were no facts in the contention that the answer of this physician in any way invaded the province of the jury. When this witness gave his opinion upon the hypothetical question put to him, it still remained for the jury to determine the facts in evidence, including the probative value of the answer to the hypothetical question, and to find the weight of such evidence by the same rules as that of any other evidence. In the Hoveman case again the court said: "It is to be stated:

"The rule applies to hypothetical questions as to the facts, and the party seeking the opinion of the witness is within reasonable limits, but his hypothetical question is not to be given unless it is based upon facts which have been proven, and the opinion of the witness thereon, based on the facts so proven, is to be given."

Neither the question nor the answer in dispute

infringes the rule quoted.

There are no reversible errors in the instructions complained about. It is not reversible error to instruct the jury that the plaintiff is entitled to recover if they find defendant guilty of the negligence "charged in the declaration" where the jury was also told, as a condition precedent to a finding against defendant, that they must find that the plaintiff was at and prior to the time of the accident in the exercise of due care for her own safety. Springfield v. Boiler Co., 222 Ill. 355; Krieger v. A. E. & C. R. R. Co., 242 *ibid.* 544.

The modification of defendant's third instruction was inartificial and made it a little involved; nevertheless, all the instructions considered, the error, if error there was, is not so vital as to justify the award of a new trial.

The original defendant in the suit, Henry Hochbaum, died. His widow was appointed executrix of his will and estate and was on motion substituted as defendant, in his place. Before trial she died, whereupon the present defendant, as administrator de bonis non with the will annexed was substituted in place of the deceased executrix, and it is contended that the suit abated at the time of the death of the executrix. Such contention is based upon the fact that there is no statutory provision for the substitution of a personal representative upon the death of one originally appointed, and that therefore there can be no such substitution. Counsel submit no authority to support such contention, and we will assume that the only reason for the lack of such citation is that none can be found; we are not aware of any. Substitution of a personal representative for a

infringes the title quoted.

There are no reversible errors in the instructions.

It is not reversible error to instruct the jury that the plaintiff is entitled to recover if they find defendant guilty of the negligence "charged in the declaration" where the jury was also told, as a condition precedent to a finding against defendant, that they must find that the plaintiff was at the time of the accident in the exercise of due care for his own safety.

Springfield v. Fuller Co., 230 Ill. 355; Winkler v. A. L.

A. G. R. R. Co., 344 Ill. 347.

The modification of defendant's ruling instruction

was immaterial and made it a little involved; nevertheless, all the instructions considered, the error, if

error there was, is not as vital as to justify the award of a new trial.

The original verdict in the suit, Henry

Hochstadt, died. His wife was appointed executrix of his

will and estate and was on a bench appointed as defendant.

in his place. Before trial she died, whereupon the present

defendant, as executrix of his estate, was appointed.

It is contended that the estate of the deceased

of the executrix. It is contended that the estate of the deceased

that there is no statutory provision for the appointment of

a personal representative upon the death of the testator.

appointed, and that therefore there can be no such appointment.

It is contended that the estate of the deceased

tion, and we will not say that the estate of the deceased

of such citation as the court can be found; we are not aware

of any. Substitution of personal representatives is

deceased representative must be treated in the same light and have the same force and effect as the original appointment. That the action survives is not in dispute; consequently it follows that the suit can be prosecuted against the estate while such estate is in due course of administration. There is no merit in the contention that the action abated.

It is also insisted that the damages are excessive. The amount of damages was largely a matter for the jury, and as there is nothing in the record which would warrant our finding that prejudice or passion is an element of the verdict, we have no right to disturb it. Furthermore, we think the damages awarded are no more than compensatory for the injuries suffered.

The judgment of the Superior Court is affirmed.

AFFIRMED.

GOOD PRODUCTS COMPANY,
a corporation,
Defendant in Error,
vs.
JAMES J. DWYER,
Plaintiff in Error.

203 I.A. 217

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for \$86.90 on a trial before the court, and defendant seeks this review.

The facts are not in dispute. The whole dispute centers about a settlement evidenced by a release in writing and the legal effect of that document. The parties and one Gustav Hochstadter had dealings together in virtue of some building operations under a contract between defendant and Hochstadter, which eventuated in this suit. While the suit was pending Hochstadter settled and compromised with plaintiff and took from it a written release. The matters in dispute had theretofore been arbitrated by agreement between plaintiff and Hochstadter. After Hochstadter made the settlement the suit was dismissed as to him but was prosecuted against defendant Dwyer. The release set up in defendant's affidavit of meritorious defense executed by plaintiff and received in evidence on the trial releases, in consideration of \$350 received from Hochstadter, all claims growing out of a certain contract between Hochstadter and defendant, and acknowledges full payment and satisfaction of all claims which plaintiff had against Hochstadter covering the matters in this suit. The claim of plaintiff against Hochstadter arose out of the contract between defendant Dwyer

20311 917

GOOD HUSBAND OF MARY,
a corporation,
defendant in error,

JAMES J. DWYER,
Plaintiff in error.

MR. JUSTICE HENRY DELIVERED THE FOLLOWING OPINION:

Plaintiff had judgment for \$50,000 on a trial be-
fore the court, and defendant asks this review.
The facts are not in dispute. The whole dis-
pute centers about a settlement entered by a release in
writing and the legal effect of such document. The parties
and one Gustav Hochstadtman had a long and bitter
of some kind, and the parties had a long and bitter
and defendant, a long and bitter. The
the suit was pending, defendant had no other claim
with plaintiff and took from it a large release. In
matters in dispute had a long and bitter and for many
ment between plaintiff and defendant. After defendant
made the settlement the suit was dismissed and the
prosecuted against defendant. The suit was dismissed
defendant's claim of a release and the parties
plaintiff and defendant in various ways and in various
in consideration of the release and defendant, the
claim arising out of a certain contract between the parties
and defendant, and defendant has for many years been in possession
of all claims which plaintiff had against defendant. In
ing the matters in dispute. The claim of plaintiff against
Hochstadtman arose out of the contract between defendant and

and Hochstadter. The release to Hochstadter by plaintiff settled the controversy between the parties here and Hochstadter, all of whom, at the time of the making of the settlement and the delivery of the release, were parties to this suit. The claim in controversy was for an unliquidated amount and was therefore the subject of accord and satisfaction. The settlement with Hochstadter operated as a settlement of the entire controversy by extinguishing the whole claim, and such settlement enured to the benefit of defendant.

Where an honest dispute exists a settlement made by a creditor with one of two debtors jointly liable, will, regardless of the knowledge of or participation in such settlement of the other party, enure to the benefit of such non-participating debtor. In brief, satisfaction of a debt by one of two joint debtors discharges the obligation of both, and, by parity of reasoning, the release in evidence discharged the debt in suit. Leafgreen v. Telford, 169 Ill. App. 582; State v. Story, 57 Miss. 738. The doctrine applicable here is correctly stated in 1 Cyc.318, thus:

"Accord and satisfaction with one of several plaintiffs or joint creditors is a complete extinction of the claim and is a good accord and satisfaction without showing that the one who made the settlement had authority from the others to do so."

The settlement made by Hochstadter with plaintiff worked an accord and satisfaction and discharged the claim in suit. The trial Judge should have proceeded no further after such condition was disclosed.

The judgment of the Municipal Court is reversed and a judgment of nil capiat and for costs entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT

AND FOR COSTS.

and Hochstetler. The release of Hochstetler by plaintiff settled the controversy between the parties here and Hochstetler, all of whom, at the time of the settlement and the delivery of the release, were parties to this suit. The claim in controversy was for an unliquidated amount and was treated as the subject of account and satisfaction. The settlement with Hochstetler operated as a settlement of the entire controversy by extinguishing the whole claim, and such settlement entered to the benefit of defendant.

Where an honest dispute exists a settlement made by a creditor with one of two debtors jointly liable will, regardless of the knowledge of or participation in such settlement of the other party, operate to the benefit of such non-participating debtor. In this, satisfaction of a debt by one of two joint debtors discharges the obligation of both, and, by parity of reasoning, the release in evidence discharged the debt in Witt, Leitzinger v. Leitzinger, 109 Ill. App. 885; Witt v. Leitzinger, 738 Ill. 100. The doctrine applicable here is correctly stated in Witt, Leitzinger v. Leitzinger, 109 Ill. App. 885; Witt v. Leitzinger, 738 Ill. 100.

"According and satisfied with one of several plaintiffs or joint creditors is a complete satisfaction of the claim and in a good sense and satisfaction with one of the parties who made the settlement and such right from the others to be so."

The settlement made by Hochstetler with plaintiff

settled the account and satisfaction and discharged the

claim in suit. The annual lease was not entered to

further after such satisfaction was obtained.

The judgment of the court was reversed.

and a judgment of \$11,000.00 entered in this case.

REVEREND AND THE VILLAGE

AND FOR THE

JAMES DONOVAN,
Appellee,

vs.

NATIONAL LIFE INSURANCE COMPANY
OF THE UNITED STATES OF AMERICA,
WERNER BROS. EXPRESS & STORAGE
CO., ALBERT M. JOHNSON, LEWIS A.
STEBBINS, HENRY H. WINDSOR and
OLIVER L. WATSON,
Appellants.

203 I.A. 219

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. We assume after an examination of the record that appellee, realizing the futility of an attempt to sustain the action of the trial court, refrained from any effort to fend off the inevitable. The order appealed from was entered at a time when the court lacked jurisdiction so to do, and it is clearly void.

At the November term 1915 the court dismissed the suit for the failure of plaintiff to file a bond for costs. At the January term 1916 on motion of plaintiff the court vacated the order of dismissal on the ground that the order of dismissal was entered because the clerk had placed the motion upon the contested motion calendar while there was no motion in writing as required by the rules of the court, and that the court supposing such motion was on file entered the order of dismissal. The court found that its action in dismissing the suit in the absence of a written motion was an error of fact. The motion to dismiss was heard and entered in the absence of plaintiff, although his counsel had caused the motion to be placed upon the contested motion calendar.

Because the court did not know when the order

2031 A. 219

APPEAL FROM SUBMISSION
COURT OF COMMONS

JAMES BOWMAN
Appellant

vs.

NATIONAL LIFE INSURANCE COMPANY
OF THE UNITED STATES OF AMERICA
JAMES BOWMAN, JAMES BOWMAN & COMPANY
CO., ALBERT R. JOHNSON, LEWIS A.
STUBBS, HENRY H. WILSON and
OLIVER L. WATSON
Appellants

MR. JUSTICE ROBINSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the court.

An examination of the record shows that the appellant, James Bowman, was the owner of a certain piece of land. The order appealed from was entered at a time when the court was sitting in session. The order was entered at a time when the court was sitting in session. The order was entered at a time when the court was sitting in session.

As the appellant failed to file the necessary documents.

the suit for the failure of plaintiff to file a copy for record. At the January term 1910 on motion of plaintiff the court vacated the order of dismissal on the ground that the order of dismissal was entered because the clerk had placed the motion upon the congested motion calendar. It is true that no motion in writing as required by the rules of the court, and that the court suspending such motion was on the congested calendar. The court found that it is not in dismissing the suit in the absence of a written motion was an error of fact. The motion to dismiss was heard and entered in the absence of plaintiff, although his counsel had caused the motion to be placed upon the congested motion calendar. Because the court did not know when the order

was entered that the motion made to dismiss was not in writing, and notwithstanding that if the court had possessed such knowledge the order would not have been entered, this in no view of the case rendered the error in so doing, if error it was, one of fact and not of law. The most that can be said of the omission to file a written motion is, that it was an error of procedure and can in no aspect of the case be regarded as an error of fact. Section 89 of the Practice Act had, in these circumstances, no application. The order vacating the judgment after the term at which it was entered is void. Barnes v. Chicago City Ry. Co., 185 Ill. App. 148; Pisa v. Rezek, 286 Ill. 344. What Mr. Justice Adams said in the Pisa case supra in 108 Ill. App. 198, is not only applicable here but determinative of the whole jurisdictional question involved. He said in substance: Conceding that court rules not in conflict with any statute have, with reference to practice in the court, all the binding effect of a statute, the real question is whether non-compliance with these rules of practice affects the jurisdiction of the court, and even assuming that motions placed on the contested motion calendar could not regularly be called up for disposition except on notice, yet if the motion is called up and disposed of without such notice having been given, this is a mere irregularity, or error, and does not affect the jurisdiction. The rules are merely regulative of the practice. While in some of the cases cited by counsel it has been held error for the court to disregard its rules of practice, no case has been cited, nor has it been held in any case known to us that such disregard affects the question of jurisdiction. The court having had jurisdiction of the persons and the subject matter when the order was made dismissing the appeal, and a number

of terms of the court having intervened between the term when the order was entered and the date when the motion to vacate the order was made, the court was powerless to allow the motion. The judgment dismissing the appeal is final and binding on the parties, and the law is thoroughly settled in this state by a long line of decisions that a court cannot set aside or vacate such a judgment at a term subsequent to that at which it was rendered.

The judgment of the Superior Court setting aside the order of dismissal is reversed.

REVERSED.

203 I.A. 220

ARTHUR C. MARSHALL,
Plaintiff in Error,

vs.

DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY, a corporation,
Defendant in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

The judgment in the trial court was for \$99.20 upon a trial without a jury, and plaintiff seeks this review and a judgment for the full amount of his claim.

The stenographic report was on motion stricken from the record and we are therefore confined in our duty to search for error to the statutory record. The main question for our consideration in the present condition of the record is: Does the affidavit of defense state facts which if proven constitute a bar to the action? We think it does, and on that assumption the judgment should be affirmed.

The statement of claim avers a shipment by plaintiff of 310 boxes of oranges in good condition from Oviedo, Florida, to Norwich, New York, which were received by defendant at Northumberland, Pennsylvania, for carriage to destination; that the shipment reached its destination in bad condition through the negligence of defendant; and that the oranges were sold and defendant damaged \$500.

In its affidavit of meritorious defense defendant denied that the oranges were delivered to the initial carrier in sound condition, and denied that they were damaged while in its possession by any act on its part, or that any damage resulted to the oranges while in its

207 I.A. 220

ARRESTED IN NEW YORK

ARRESTED IN NEW YORK

ARTHUR O. MARSHALL,
Plaintiff in Error,

vs.

SHAWANNA RAILROAD COMPANY, a corporation,
Defendant in Error.

MR. JUSTICE HOBSON DELIVERED THE OPINION OF THE COURT.

The judgment in the trial court was for \$10,000

upon a trial without a jury, and plaintiff seeks this re-

view and a judgment for the full amount of his claim.

The stenographic report was on motion withdrawn

from the record and we are therefore confined in our duty to

search for error in the stenographic record. The main ques-

tion for our consideration in the present connection of the

record is: Does the affidavit of defense state facts which

if proven constitute a bar to the action? We think it does,

and on that assumption the judgment should be affirmed.

The affidavit of defense avers a shipment by

plaintiff of 510 boxes of oranges in good condition from

Oviedo, Florida, to St. Louis, Mo., which were received

by defendant at Fort Lauderdale, Fla., in good condition.

It is further stated that the shipment received its destination in

bad condition through the negligence of defendant; that

the oranges were sold and defendant received the proceeds.

In its affidavit of defense plaintiff alleges that

and that the oranges were sold and defendant received the proceeds.

carried in good condition, and that the oranges were sold

and while in its possession by its agent on January 11, 1911,

that any damage resulted to the oranges while in its

possession, and averred that the oranges were sold by defendant in their damaged condition after notice to plaintiff and at its request; that the net amount realized from the sale, being the amount of the judgment, was tendered to plaintiff and refused; that defendant acted in good faith and that no notice in writing of plaintiff's claim was made within four months, as required by the terms of the contract of carriage. These defenses being proven, as we assume they were, the extent of the right of recovery was limited to the amount of the net proceeds of the sale of the oranges, tendered to plaintiff before action, for which plaintiff had judgment. Hagen Paper Co. v. East St. Louis Publishing Co., 269 Ill. 535.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

possession, and averred that the oranges were sold by defendant in their damaged condition after notice to plaintiff and at its request; that the net amount realized from the sale, being the amount of the payment, was tendered to plaintiff and returned; that defendant acted in good faith and that no notice in writing of plaintiff's claim was made within four months, as required by the terms of the contract of carriage. These defenses being proven, as he assumed they were, the extent of the right of recovery was limited to the amount of the net proceeds of the sale of the oranges, tendered to plaintiff before action, for which plaintiff had judgment. Hazen Paper Co. v. Lee & Co. Packing Co., 209 Ill. 535. The judgment of the appellate court is affirmed.

ALFRED.

LOUIS ROSENBLUTH, doing business
as the Anchor Mills,

Appellant,

vs.

HEINTZ FOOD COMPANY OF ILLINOIS,
a corporation,

Appellee.

203 I.A. 226

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE HOLIDOM DELIVERED THE OPINION OF THE COURT.

Defendant had judgment, on a trial before the court without a jury, on its claim of set-off for \$66.44, and plaintiff prosecutes this appeal, asking a reversal and a judgment upon his claim for \$38.06.

Plaintiff sued to recover \$38.06 for flour sold and delivered at various times to defendant. Defendant interposed a set-off, claiming \$160 as damages suffered by it by reason of the fact that plaintiff failed to deliver winter wheat flour, but in its stead delivered corn flour, causing a loss of two batches of biscuits in the making of which the corn flour was used.

We think the court might properly find that defendant by its evidence sustained its cross claim as alleged even after eliminating the testimony of the witness Heintz, which was objected to as hearsay. We think the testimony sustains defendant's contention that the two batches of biscuits were spoiled because plaintiff delivered corn flour instead of winter wheat flour as ordered, and that the mistake was not readily discoverable until the biscuits were baked, when the color would betray the fact that corn flour and not winter wheat flour was the ingredient that had been used.

The biscuits in question, manufactured by defend-

2081A. 228

ALL AMERICAN TRADING CO.
CHICAGO, ILL.

LOUIS ROSENTHAL, doing business
as the Auctioneers,
Appellants,
vs.
HEINZ FOOD COMPANY OF ILLINOIS,
a corporation,
Appellees.

MR. JUSTICE ROSENTHAL DELIVERED HIS OPINION ON THE 10TH DAY OF

Defendant's appeal, and the trial before the

court without a jury, on the 10th day of January, 1934, and plaintiff prosecuted this appeal, with a reversal and a judgment upon his claim for \$2,000.

Plaintiff sued to recover \$2,000 for loss of and delivered at various times to defendant, a quantity of corn flour, claiming that it was damaged and spoiled by reason of the fact that defendant had delivered to plaintiff, and in its stead delivered to plaintiff, causing a loss of two batches of biscuits in the amount of \$2,000 and corn flour was used.

The trial court, after a hearing, found that defendant by its evidence introduced and admitted that it had even after eliminating the testimony of the witness who, which was objected to as hearsay. The witness testified that defendant's contention is that the flour was spoiled because plaintiff delivered to it flour instead of winter wheat flour as ordered, and that a mistake was not readily discoverable until the biscuits were baked, when the color would betray the fact that the flour was not winter wheat flour was the important fact in the case. The biscuits in question, introduced in evidence,

ant, were what are known as "laxative biscuits." The ingredients which gave the biscuits their peculiar laxative characteristic were a secret formula not disclosed by the testimony. It is contended that the spoiled condition of the biscuits may have been brought about by other ingredients known only to and used by defendant with the flour in making the biscuits. We think, however, the whole evidence considered, that the court might properly reach the conclusion that the spoiled condition of the biscuits resulted from plaintiff delivering corn flour instead of the winter wheat flour ordered.

The trial Judge saw the witnesses and was better able than are we to judge of the weight to be given to their testimony and to give credit accordingly. Notwithstanding the evidence is somewhat in conflict, yet as we are unable to say that the finding of the court is contrary to its probative force, we are not permitted to disturb the finding of the trial Judge, whose opportunities for determining the weight and preponderance of the evidence were so much better than ours. He had the parties before him, while we have only the unresponsive record.

We see no occasion to disagree with the conclusions which the trial Judge reached, and the judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

and, well, what was the result? The answer
shows which have a similar, though not identical, character-
istic were a number of the same kind, and the similarity
it is contended that the physical character of the results
may have been produced by other causes, and not only
to and used by different persons, but also by different
causes. We think, however, that the evidence is such that
that the count is a proper one, and that the
applied condition of the results is such that
delivering them from the end of the line at the
ordered.

The first of the two is the fact that the
able than any one to have done it, and the fact that
testimony and the fact that the results are such
the evidence is such that the results are such
say that the results of the test are such that
force, and the fact that the results are such
trial judge, whose opinion is such that the
and the fact that the results are such that
ours. It is the fact that the results are such
where, and the fact that the results are such

to see no objection to the fact that the
sions which the trial judge has made, and the
Municipal Court in the case of the

W. B. FULLER for use of
NELL E. JORDAN,
Appellee,

vs.

THE BRIDGEPORT WOOD FINISHING
COMPANY, a corporation, etc.,
Appellant.

203 I.A. 227

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment for \$560 against appellant as garnishee on a trial before the court without a jury, and ordering that \$167.10 thereof be recovered for the use of the beneficial plaintiff.

The answer of the garnishee sets up that W. B. Fuller was in the employ of defendant at Bridgeport, Connecticut, and that at the time of the service of the writ it was indebted to him in the sum of \$17.50; that Fuller was a married man, residing with his family in the State of Connecticut. Exemptions were claimed for Fuller by the garnishee on the ground that his wages under the laws of Connecticut were exempt from garnishment, all wages earned for personal services being exempt under the laws of that State. The answer further sets up that Fuller was a laborer working around the factory of appellant and that his wages were paid on Saturday of each week.

The first answer was on motion stricken and appellant ordered to file a new answer setting up "how much money had been paid by the garnishee to W. B. Fuller since the service of the garnishment writ." Interrogatories

307 1 22

W. H. KELLER, or use of
KELLER, L. JONAS,
Applicant.

VS.

THE BUILDING & LOAN ASSOCIATION
COMPANY, a corporation,
Applicant.

IN SENATE, January 1, 1911.

REPORT OF THE COMMISSIONER OF THE LAND OFFICE
for 1910, relative to the land owned by the
the court without a jury, and returning that the land
of be recovered for the use of the land office.

The matter of the land office was referred to the
Primer was the land office, and the land office,
noticed, and the land office, and the land office,
it was referred to the land office, and the land office,
was a mortgage, and the land office, and the land office,
of Connecticut, and the land office, and the land office,
the provision of the land office, and the land office,
of Connecticut, and the land office, and the land office,
earned for the land office, and the land office,
of that state, and the land office, and the land office,
was referred to the land office, and the land office,
that the land office, and the land office, and the land office,
relative to the land office, and the land office,
money had been paid, and the land office, and the land office,
the service of the land office, and the land office,

were propounded to the garnishee and the answers thereto substantiated the facts set up in the answer. The facts set forth in appellant's answer were not controverted by any pleading or affidavit or in any way denied or put in issue; appellant as garnishee was therefore entitled to be discharged. No issue having been joined upon its answer, the averments of fact therein stood admitted and must be taken as true. Wabash R. R. Co. v. Dougan, 142 Ill. 248.

The money in the hands of the garnishee due to Fuller being for wages as a laborer were, under the averments of the answer, exempt. The assertion of the right of exemption in the answer by appellant was sufficient to preserve that right to Fuller. R. Jackson & Co. v. Republic Iron and Steel Co., 141 Ill. App. 453.

Under Section 14 of the Garnishment Act as amended in 1901, the employer is not required to answer for wages earned by a wage earner after the service of the writ. Lund for use, etc. v. Dole Valve Co., 185 Ill. App. 350.

A 5948
The trial court in requiring appellant as garnishee to answer for wages earned by Fuller after the service of the writ of garnishment, did so in direct contravention of the provision of Section 14 of the Garnishment Act, supra.

The judgment of the Municipal Court is reversed and the cause is remanded with directions to the Municipal Court to enter an order discharging appellant as garnishee.

REVERSED AND REMANDED
WITH DIRECTIONS.

were propounded to the witnesses and the answers thereto substantiated the facts set up in the answer. The facts set forth in appellant's answer were not controverted by any pleading or affidavit or in any way denied or put in issue; appellant as garnishee was therefore entitled to be discharged. His issue having been joined upon the answer, the averments of fact therein stood admitted and must be taken as true. Wabash R. R. Co. v. Hannan, 102 Ill. 231. The money in the hands of the garnishee was

to Miller being for wages as a laborer there, and the averments of the answer, except. The averments of the right of exemption in the answer by appellant was sufficient to preserve that claim to Miller. A. L. Hancock & Co. v. Bank of Iron and Steel Co., 141 Ill. App. 433.

Under Section 14 of the Constitution act as amended in 1901, the employer is not required to answer for wages earned by a wage earner after the service of the writ. Land for use, etc. v. Dole Railway Co., 188 Ill. App. 380.

The trial court in requiring appellant to garnish to answer for wages earned by Miller after the service of the writ of garnishment, did so in direct contravention of the provision of Section 14 of the Constitution. Act, supra.

The judgment of the trial court is reversed and the cause is remanded with directions to the trial court to enter an order dismissing the writ of garnishment. REVEREND J. AND J. C. HARRIS
ATTORNEYS AT LAW

I. M. WEINGARDEN,
Plaintiff in Error.

vs.

LOUIS WEINBERG and
ISADORE WEINBERG,
Defendants in Error.

2426
203 I.A. 228

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

There is a document found in the record in this case certified by the trial Judge as a "certificate of evidence." It cannot even by the most liberal construction be held to constitute a stenographic report of the proceedings had upon the trial of the cause, or as fulfilling the requirements of a bill of exceptions. Nowhere in this so-called "certificate of evidence" or in the certificate of the trial Judge thereto is it stated that the certificate contains all of the evidence in the case. The certificates and oaths of the court reporter and of the trial attorney for plaintiff in error, which follow that of the trial Judge, form no part of such certificate of evidence. This is a case of the first class in the Municipal Court. In this class of cases the proceedings, other than the statutory record, must be preserved for review by bill of exceptions, stenographic report or certificate of evidence. There is no bill of exceptions, stenographic report or certificate of evidence in this record, either in fact or by construction of the document called a "certificate of evidence." The making of a certificate that the record contains all the evidence is a judicial act which must be performed by the trial Judge. Certificates of a reporter and an attorney for one of the parties cannot be received as a substitute.

204 I.A. 228

RECEIVED

DEPT. OF JUSTICE

I. M. WEINGARTEN,
Plaintiff in Error,

vs.

LOUIS WEINGARTEN and
ISADORA WEINGARTEN,
Defendants in Error.

MR. JUSTICE ROBERT H. JACKSON, THE COURT OF APPEALS, D.C.

There is a document found in the record in this case certified by the trial judge as a "certificate of evidence." It cannot even by the most liberal construction be held to constitute a stenographic report of the proceedings had upon the trial of the case, or as fulfilling the requirements of a bill of exceptions, entered in such case called "certificate of evidence" or in the certificate of the trial judge there is it stated that the certificate contains all of the evidence in the case. The certificate and parts of the court reporter and of the trial attorney for plaintiff in error, which follow that of the trial judge, form parts of the certificate of evidence. This is a case of the first class in the highest court in the land, and since the proceedings, upon the trial of the case, must be preserved for review by bill of exceptions, stenographic report or certificate of evidence. It is no bill of exceptions, it is not a certificate of evidence in fact or by construction of the document called a "certificate of evidence." The asking of a certificate that the record is correct is evidence as a judicial act when made by the trial judge. Certificates of a reporter and a stenographer one of the parties cannot be received as a certificate.

Interpolating the affidavits referred to is tantamount to conceding that the facts therein recited are necessary to be made to appear to present such facts for review in this court. The method pursued, however, is abortive for such purpose. 8618

Section 81 of the Practice Act provides for three methods of preserving the facts in a cause for review. They are by bill of exceptions, stenographic report and certificate of evidence. This section governs in first class cases in the Municipal Court. In that section there is a provision for a praecipe record, but the record before us does not purport to be of that character; consequently, the reasoning in Miller v. Anderson, 269 Ill. 608, has no application.

Without a bill of exceptions, certificate of evidence or stenographic report, certifying that it contains all the evidence heard upon the trial in a first class case in the Municipal Court, unless such record is a praecipe record, a court of review will presume that the judgment is sustained by the evidence heard upon the trial, and such judgment will not be disturbed upon review for errors of fact. People v. Moore, 188 Ill. App. 418.

The errors assigned call for a review of the evidence, none of which involves the statutory record solvable without reference to a bill of exceptions.

Defendants in error move to strike the document called a "certificate of evidence" from the record and to affirm the judgment. The motion is allowed and the judgment of the Municipal Court is affirmed.

AFFIRMED.

information the affidavit referred to is
 tantamount to conceding that the facts therein recited are
 necessary to be made to appear as present such facts for
 review in this court. The method pursued, however, is
 defective for such purpose.

Section 31 of the Evidence Act provides for
 three methods of proving the facts in a cause for review.
 They are by bill of exceptions, stenographic report and cer-
 tificate of evidence. This section governs in that class
 cases in the Municipal Court. In that section there is a
 provision for a stenographic record, and the record before me
 does not purport to be of that character; consequently,
 the reasoning in Miller v. Anderson, 106 Ill. 60, was no
 application.

Without a bill of exceptions, certification of
 evidence or stenographic report, deciding that it contains
 all the evidence heard upon the trial in a first class case
 in the Municipal Court, unless such report is a stenographic
 record, a court of review will presume that the testimony is
 sustained by the evidence heard upon the trial, and such
 judgment will not be disturbed upon review for errors of
 fact. People v. Moore, 108 Ill. 471, 472.

The errors sustained only for a review of the
 evidence, none of which involve the substantial rights
 of the parties without reference to a bill of exceptions,
 constitute an error which will be corrected.
 called a "certification of evidence" and the result is to
 affirm the judgment. The action is allowed and the case is
 of the Municipal Court as affirmed.

D. I. BUSHNELL and R. W. POMMER,
Partners as D. I. BUSHNELL & CO.,
Plaintiffs in Error,

vs.

HENRY H. CHESTER, doing business
as H. H. CHESTER & CO.,
Defendant in Error.

203 T.A. 229

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion
of the court.

D. I. Bushnell and R. W. Pommer, partners as D. I. Bushnell & Co., brought suit against Henry H. Chester, doing business as H. H. Chester & Co., to recover the sum of \$566.50, damages alleged to have been sustained by reason of the defendant's failure to carry out a written contract entered into between the parties. The case was tried before the court without a jury, and from a judgment for costs entered in favor of the defendant, the plaintiffs prosecute this writ of error.

[It appears that on July 29, 1913, the parties entered into a written contract whereby the plaintiffs agreed to purchase and the defendant agreed to sell 1000 bushels of onion ^{of specified varieties} sets to be delivered on or about February 10, 1914. The contract provided among other things that the onion sets were "to be screened through one inch mesh sieve." The defendant, whose place of business was in Chicago, shipped the onion sets to the plaintiffs at St. Louis. When the shipment reached St. Louis plaintiffs made an examination of the sets and refused to accept them on the ground that many of them were too large and some of them rotten. After considerable correspondence between the parties, the defendant ordered the car returned to him at Chicago, which was done. Plaintiffs demanded

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D. I. BARNETT and J. W. BARNETT,
Partners as D. I. BARNETT & CO.,
Plaintiffs in Error,

THEIR V.

VS.

WILLIAM B. BARNETT

Defendant.

HENRY M. WELLS, Solicitor General,
as H. M. WELLS & CO.,
Attorneys in Error.

WILLIAM B. BARNETT, Defendant, appealed to this court.

of this court.

D. I. Barnett and J. W. Barnett, Defendants as D. I.

Barnett & Co., brought suit against Henry M. Wells, Plaintiff,

business as D. I. Barnett & Co., to recover the sum of \$100.00.

damages alleged to have been sustained by reason of the defen-

dant's failure to carry out a writ of habeas corpus entered into

between the parties. The case was tried before the court

without a jury, the court having held that the case was a matter

of the law, and the plaintiff presented the case in error.

Assignment of Error of a writ of habeas corpus, as stated in error.

into a writ of habeas corpus, and the plaintiff presented the case

case and the defendant agreed to sell the plaintiff the same

case to be delivered on or before the 1st day of January, 1911.

plaintiff provided that the defendant should deliver the same

to be returned to the plaintiff on or before the 1st day of January,

whereupon the plaintiff agreed to sell the defendant the same

to the plaintiff on or before the 1st day of January, 1911.

the plaintiff made an assignment of error, and the court

found that the case was a matter of the law, and the

law and fact of the case. All of the above-mentioned

facts being as stated, the court held that the case was

turned to him at Chicago, which was done. The plaintiff presented

ad X that the defendant ship the onion sets called for by the contract, and advised the defendant that unless this was done, plaintiffs would go upon the market and purchase such sets at the market price and hold the defendant for the loss. The defendant contended that the sets were in accordance with the contract and refused to ship any more. After the sets were returned to the defendant plaintiffs purchased from other parties other sets of the kind mentioned in the contract, paying therefor \$566.50 more than they had agreed to pay the defendant, for which amount this suit was brought. It was stipulated between the parties that if the plaintiffs were entitled to recover, the judgment should be for the amount of their claim.

L The evidence shows that some of the onion sets were an inch and an eighth to an inch and a quarter in diameter and too large to pass through a one inch mesh sieve; plaintiffs' evidence tending to prove a larger number than that introduced on behalf of the defendant. It also appears from the evidence that the sets were screened through a seven-eighths inch bar sieve with cross-bars five inches apart and not through a one inch mesh sieve, before shipment.

apl Plaintiffs' position seems to be that the contract was not complied with, because (1) the sets were not actually screened through one inch mesh sieve, and (2) some of the sets were too large to pass through a one inch mesh sieve.

The court found as a fact that certain tests were made by both the plaintiffs and the defendant to ascertain the size of the sets and "that some of the onions of said shipment of 1000 bushels * * * were too large to go through a one inch mesh sieve." The evidence introduced on behalf of the plaintiffs was in the form of depositions. Witnesses testified in open court on behalf of the defendant. The record, however, does not give any of the questions and

that the defendant ship the onion note called on by the contract, and advised the defendant that unless the same, plaintiff's would be used the market and plaintiff's such rate at the market price and said the defendant in the fact. The defendant contract that the note were in accordance with the contract and returned to ship to more. After the note were returned to the defendant plaintiff's purchased from some parties other well of the and mentioned in the contract, paying therefor \$8.00 more than they had agreed to pay the defendant, for which we are this suit was brought. It was stipulated between the parties that it the plaintiff's was entitled to recover, the defendant should be for the amount of their claim.

The evidence shows that some of the onion note were an inch and an eighth to an inch and a quarter in diameter and too large to pass through a one inch mesh sieve; plaintiff's evidence tending to prove a larger number of that introduced on behalf of the defendant. It also appears from the evidence that the note were sorted through a seven-eighths inch box sieve with cross-bars five inches by six and not through a one inch mesh sieve, as the defendant's witnesses' testimony was not reconciled with, because (1) the note were not actually returned some of one inch mesh sieve, (2) some of the note were too large to pass through a one inch mesh sieve. The note found on a boat and several tests were made by both the plaintiff and the defendant to determine the size of the note and "that some of the notes of the shipment of 1000 barrels were too large to pass through a one inch mesh sieve." The evidence introduced on behalf of the plaintiff was in the form of deposition. The defendant testified in open court on behalf of the defendant. The record, however, does not give any of the questions and

answers put to any of the witnesses, but it is set forth only in narrative form. The number or quantity of the sets that were too large to pass through a one inch mesh sieve cannot be ascertained from the record, nor does the court make any specific finding in this regard.

We cannot agree with plaintiffs' contention that they are entitled to recover on the ground that the evidence shows that the sets were not actually screened through a one inch mesh sieve. This requirement of the contract was merely for the purpose of fixing the size of the sets, and it is not material whether they were actually screened, if the sets were of the size called for by the contract.

Plaintiffs next contend that they are entitled to recover for the reason that some of the onions were too large to pass through a one inch mesh sieve, and were not therefore of the size contemplated by the contract. The sale in this case was by a particular description as to kind and quality -- in other words, it was an agreement by the defendant to sell certain varieties of onion sets not more than one inch in diameter. A slight or partial neglect on the part of one of the parties to a contract to observe some of the terms or conditions thereof will not justify the other party to at once abandon the agreement. Pittenger v. Pittenger, 208 Ill. 582. Plaintiffs had no right to rescind the contract, unless the defendant had failed in a substantial manner to observe his part of the contract. There is no complaint that the kind of sets mentioned in the contract - red and yellow - were not tendered, the only objection being that some of them were more than one inch in diameter. The evidence tends to show that large sets are more apt to grow to seed than small ones, and are therefore

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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Don't let me know, after that, to what you might be going, or is not?

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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of less value. The court, however, evidently found that the sets tendered were in substantial conformity with the contract, and after a careful examination of the record, we are unable to say that such finding is not sustained by the evidence.

The case of Wabash Canning Company v. Nicholas, 187 Ill. App. 176, upon which plaintiffs rely is not in point. In that case there was a sale of "fancy Alaska peas*** like samples submitted." It was held that the contract was not satisfied by tendering Alaska peas like the samples, but that in addition, the peas tendered must be of the kind specified "fancy Alaska peas". In that case the kind of peas specified in the contract were not tendered, while in the case at bar, the kind of sets, viz., red and yellow, were tendered, and the only objection to them was that some of them were too large.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

of less value. The total, however, is still about half
the new part of the old. The old part is still about half
the new part, and after a period of time it will be
we are unable to say that the thing is not the same as
the original.

The case of the old part is not the same as the new part.
187 Ill. App. 1st, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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The case of the old part is not the same as the new part.

BARNEY NELSON and AXEL LeMOON,
Copartners, doing business as
NELSON & LE MOON,

Defendants in Error,

vs.

A. F. McKEOWN,

Plaintiff in Error.

203 I.A. 231

ERROR TO

MUNICIPAL COURT

OF CHICAGO,

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

Defendants in error brought suit against the
plaintiff in error in the Municipal Court of Chicago, to
recover for repairs and storage of defendant's automobile;
and supplies furnished. Plaintiffs recovered a judgment
for \$134.68, to reverse which the defendant prosecutes
this writ of error.

Plaintiffs' business was that of repairing
automobiles. The evidence tends to show that about January,
1910, the defendant together with one Pope took the auto-
mobile to plaintiffs' place of business, and on two differ-
ent occasions the defendant ordered certain repairs which
were made by the plaintiffs and paid for by the defendant;
that Pope was engaged in experimenting with a patented
spring hub, and the defendant loaned Pope the automobile
for such purpose. It was necessary during the experimenta-
tions that certain repairs be made and supplies furnished
for the automobile. The machine was taken out from time
to time by Pope and returned to plaintiffs' place of busi-
ness. On June 23, 1910, defendant called on plaintiffs and
obtained the machine and started to drive to his farm in

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WILLIAM WILSON and ALAN LAMSON,
Co-defendants, doing business as
WILSON & LAMSON,
Defendants in error,

Plaintiff in error,

vs.

HONORABLE COURT
OF CHICAGO,

A. W. MOOREHEAD,
Plaintiff in error.

THE FOLLOWING VERDICT WAS RETURNED BY THE

jurors of the court,

That the defendant in error did not

guiltily in error in the trial of the case, as
shown by the evidence and the weight of the evidence
and the jury's verdict. The defendant recovered a judgment
for \$100.00, in recovery with the defendant's possession
this will of error.

The defendant's evidence was that of negligence

automobile. The evidence tends to show that the defendant
did not exercise due care in the operation of the automobile
mobile in question. The defendant's evidence was that
and occasionally the defendant exercised due care in the operation
were made by the plaintiff and which was by the defendant;
that the defendant was negligent in the operation of the automobile
which was the cause of the accident. The defendant's evidence
for such purpose. It was necessary for the defendant to
show that the defendant was negligent in the operation of the automobile
for the automobile. The defendant was negligent in the operation
to time by the defendant and which was by the defendant;
near. On June 21, 1910, the defendant was negligent in the operation
obtained the automobile and started to drive to the town in

Lake County, when the machine broke down. He then had it returned to the plaintiffs and ordered certain repairs. The machine remained at plaintiffs' place of business until some time in the fall of 1910, when the defendant demanded his machine. Plaintiffs refused to deliver it to him until he had paid for the work which they had done at his request, and also the work done on the machine and supplies furnished during the time Pope was using it. They also claimed a bill for storage. The defendant was willing to pay the cost of the repairs which he had ordered amounting to \$19.50, but refused to pay any of the other demands. Plaintiffs brought this suit March 2, 1914, and claimed, in addition to the items above mentioned, a charge of \$5 per month for storing the car until the time of the commencement of the suit. The case was tried before the court without a jury. The court held that the defendant was liable for the repairs made and supplies furnished during the time Pope had the machine, and for storage on the car until the date when the defendant demanded the same in the fall of 1910, but disallowed the claim for storage after that date.

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The defendant contends that he was not liable for the repairs and materials furnished during the time Pope had the car. It would serve no useful purpose to discuss the evidence in this regard. Suffice it to say that it was conflicting. The court saw and heard the witnesses and was in a much better position to determine the facts than we are, and after a careful consideration of all the evidence, we cannot say that his finding is manifestly against the weight of the evidence. It will therefore not be disturbed.

ch /
The defendant further contends that he was not liable for the storage allowed, \$42.50. It appears that the car was in storage from May 10th to August 30th, 1910, a period of eighty-five days, for which plaintiffs charged fifty cents per day. Plaintiffs were entitled to a reasonable charge for storing the car, and no complaint is made that the amount is unreasonable. No storage was allowed after the time defendant demanded his car in the fall of 1910, and counsel for plaintiffs admit in this court that the ruling of the trial court in this regard was proper.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

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THE CHICAGO BUILDERS' SPECIALTIES
CO., a corporation,

Defendant in Error,

vs.

THE KOEHRING MACHINE COMPANY, a
corporation,

Plaintiff in Error.

203 T.A. 232

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

The Chicago Builders' Specialties Company, a corporation, brought suit against The Koehring Machine Company, a corporation, to recover damages for breach of a contract between the parties. The case was tried before the court without a jury, and from a judgment entered in favor of the plaintiff for the amount of its claim, \$144, the defendant prosecutes this writ of error.

The defendant contends that the evidence does not establish that there was a contract between the parties, and that as the plaintiff's claim is based on the breach of a contract, the judgment is not supported by the evidence. It appears from the evidence that [The plaintiff on December 23, 1909, wrote the defendant concerning the purchase of certain machinery. To this ^{defendant} plaintiff replied giving the cost of the several items and stating that the defendant could fill the order immediately. Nothing further appears to have been done until March 19, 1910, when the parties communicated by telephone. A witness for the plaintiff testified that on that date he talked over the telephone with a representative of the defendant and told him that they were ready to close the Horrabin deal, and asked the defendant how soon the order

2.

could be filled, ^{and} that the defendant replied by Wednesday of the following week. Immediately afterwards plaintiff wrote a letter confirming the telephone communication and instructed the defendant to ship the goods to plaintiff's customer, Horrabin, at Iowa City, Iowa. There were further communications between the parties in reference to the method of payment, the defendant insisting that it would not ship the goods except upon the receipt of a certified check for the amount, \$411. The plaintiff sent a certified check March 28th through a bank, and on March 31st, the defendant wrote a letter to the plaintiff as follows: "Owing to your late reply to our request for certified check with your order No. 5190, we cannot now except this order, and have requested the bank to return you check." It further appears ~~from the evidence~~ that the defendant filled the Horrabin order direct on March 25th. A witness for the defendant testified that in the telephone conversation March 19th, he told the plaintiff he would not accept the order; that the plaintiff would have to take it up direct with the defendant's Chicago agent. The evidence further shows ^{ed} that plaintiff had contracted to sell the machinery to Horrabin for \$555, and his profit, ^{or} ~~therefore~~, would be \$144.]

After a careful examination of all the testimony, we cannot say that the finding of the trial court that a contract was entered into between the parties is manifestly against the weight of the evidence.

^{ed} The defendant further contends that even if there was a contract, the default of the defendant in making prompt payment constituted a breach, and the defendant was therefore

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< | entitled to treat the contract as abandoned. We think the
evidence was sufficient to justify the court in finding
that the contract was not abandoned.

Finding no reversible error in the record, the
judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

entitled to treat the contract as abandoned. We think the
evidence was sufficient to justify the court in finding
that the contract was not abandoned.
Finding no reversible error in the record, the
judgment of the Municipal Court is affirmed.
Affirmed.

THE PETER SCHOENHOFEN BREW-
ING COMPANY (a corporation),

Defendant in Error,

vs.

MRS. H. M. NEWBOLD,

Plaintiff in Error.)

203 I.A. 234

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

The Peter Schoenhofen Brewing Company, a corpora-
tion, brought suit against Mrs. H. M. Newbold to recover
for goods sold and delivered, and obtained a judgment for
the amount of its claim \$558, to reverse which the defen-
dant prosecutes this writ of error.

Plaintiff alleged that it sold and delivered
to the defendant at her special instance and request
certain barrels of beer, at a price of \$8 per barrel;
that certain payments were made by the defendant, and
that there was still due and unpaid \$558.

The defendant filed an affidavit of merits which
averred that about March 1, 1910, the plaintiff agreed to
sell to the defendant all the draught beer used by her
"at the prevailing market price charged by the plaintiff
for said draught beer in the Chicago market;" that from
March, 1910, until November, 1913, she purchased from the
plaintiff 1726 barrels of beer for which she paid \$8 per
barrel; that the market price of the plaintiff's draught
beer of the same quality sold to the defendant during said
period was \$7 per barrel in the Chicago market; that she
did not learn of this until about December 26, 1913; that

she had, therefore, ever paid plaintiff \$1168, and did not owe the plaintiff any money; but on the contrary the plaintiff was indebted to her in the sum of \$1168. Defendant also filed a claim of set-off setting up substantially the same matters.

When the case came on for trial on June 8, 1915, the set-off was withdrawn and the court entered an order finding that the defense interposed was an affirmative one and therefore the burden was on the defendant to maintain it. The defendant was ordered by the court to produce her evidence in support of her affidavit of merits, which she refused to do, and because of such refusal, the court entered judgment in favor of the plaintiff for the amount of its claim. Afterwards on June 19th, this order was set aside and vacated by the court, and on motion of the plaintiff judgment was entered on the pleadings in favor of the plaintiff.

cpl
Counsel for plaintiff contends that as the defendant in her affidavit of merits admitted the receipt of the beer "for the price of which the action was brought and pleaded payment, it was unnecessary for the plaintiff below to introduce evidence of the delivery of the goods and the acceptance of the same;" that it was unnecessary for the plaintiff to prove the nonpayment of its claim to establish its cause of action; but that the defense of payment interposed by the defendant is an affirmative defense, which she must prove.

ment
It is true that where the defendant admits the receipt of the goods and the price claimed by the plaintiff and interposes as a defense that payment has been made, proof of nonpayment by the plaintiff is unnecessary to

she had, therefore, over paid plaintiff \$100, and did not owe the plaintiff any money; but on the contrary the plaintiff was indebted to her in the sum of \$100. Defendant also filed a claim of set-off asserting substantially the same matters.

When the case came on for trial on June 3, 1910, the set-off was withdrawn and the court entered an order finding that the defense interposed was an affirmative one and that therefore the burden was on the defendant to establish it. The defendant was ordered by the court to produce her evidence in support of her affidavit of denial, which she refused to do, on account of such refusal, the court entered judgment in favor of the plaintiff for the amount of her claim. Afterward on June 13th, this order was set aside and vacated by the court, and on motion of the plaintiff judgment was entered on the pleadings in favor of the plaintiff.

Consequently, the plaintiff obtained judgment in her affidavit of denial which established the burden of the proof "for the time being" the action was brought and proved payment. It was unnecessary for the plaintiff to introduce evidence of the delivery of the goods and the response of the same; but she was ordered to do so for the plaintiff to prove the nonpayment of the claim or to establish its cause of action; but that in a case of payment, which was proved by the defendant is an affirmative one, which she must prove.

It is true that where the defendant admits the receipt of the goods and the price claimed by the plaintiff, and introduces as a defense that payment has been made, proof of nonpayment by the plaintiff is unnecessary to

establish a cause of action, but the burden of proving payment is on the defendant. Baldwin v. Clock, 68 Mich. 201; 30 Cyc. 1264. To the same effect are Hanke v. Gobiaskey, 57 Ill. App. 268; Harley v. Harley, 57 Ill. App. 138; Price v. German Exchange Bk., 60 Ill. App. 418.

Find
Defendant in her affidavit of merits alleged that she had purchased 1726 barrels of beer for which she was charged by the plaintiff \$8 per barrel; that the price was to be the market price which was \$7 per barrel or \$12,082; that she had paid the plaintiff \$13,250 and had, therefore, over-paid him \$1168. From the foregoing it clearly appears that the price to be paid for the beer was in dispute, and therefore under the authorities above cited, the burden was upon the plaintiff to prove the price at which the beer was sold to establish his cause of action. The judgment of the Municipal Court of Chicago will therefore be reversed and the cause remanded.

REVERSED AND
REMANDED.

432 - 21431.

EMILY GUSTAFSON and VERNON
GUSTAFSON, a Minor, who sues
by EMILY GUSTAFSON, his mother
and next friend,

Appellees,

vs.

ROBERT PETERSON and WILLIAM
SCHAEFER,

Appellants.)

203 I.A. 242

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE GOODWIN delivered the opinion of the court.

X
Appellants seek the reversal of a judgment against them, in favor of appellees, for \$2,500, entered in an action on the case, brought under the provisions of section 9 of the Dram Shop Act, for damage to their means of support. (2.5 4.4)

The evidence offered on behalf of appellees tended to show that appellants, who were saloon keepers, had sold intoxicating liquors to one Carl Gustafson, the husband of one, and the father of the other appellee; that as a result he had become an habitual drunkard and had contributed less and less to their support and had finally ceased to contribute to it at all. The evidence in their behalf further tended to show facts and circumstances which, if true, would sustain a finding that sales of liquor to Gustafson were made under circumstances which would justify the allowance of punitive damages. The testimony on behalf of appellants, however, tended to show that they had expressly refused to sell Gustafson liquor while he was intoxicated or at any time after they had learned that he was accustomed to become intoxicated, and may further fairly be said to be to the effect that they had not caused his intoxication, or sold liquor to him while he was intoxicated. There was also testimony on behalf of

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appellees that Gustafson had been seen in an intoxicated condition subsequent to the days on which it was shown that he obtained liquor from the appellants, and also at times subsequent to the filing of this suit, and that when drunk, his attitude toward his wife and child was abusive.

cd The admission of the evidence in regard to what happened subsequent to the times when appellants were charged with having sold liquor to Gustafson, as well as the testimony as to his attitude toward his wife and child, when intoxicated, the appellants contend was erroneous. It is further contended that the court erred in giving some of the instructions offered on behalf of appellees, and in refusing to give some of the instructions offered on behalf of appellants, and that for these reasons, the judgment should be reversed.

< So far as the evidence as to Gustafson's intoxication subsequent to the times when appellants were supposed to have sold him liquor, and at times subsequent to the beginning of this suit is concerned, we think it is sufficient to say that the gravamen of this action is injury to appellees' support, through causing the intoxication of the husband and father, and the evidence in the case offered on behalf of appellees tended to show that as the result of such intoxication, Gustafson became an habitual drunkard; the evidence of these latter occasions on which he was alleged to have been intoxicated, tends to substantiate this, and to show the continued effects of appellants' alleged wrongful acts and the continued injury to appellees' support resulting therefrom. Clearly, appellees' right to recover was not confined to the damages which they had suffered up to the time when suit was brought, since the wrongful acts complained of give rise to but one cause of action, and in it,

all damages flowing from these acts must be recovered, if they are recovered at all; consequently, appellees were entitled to show that they had suffered, as the result of the wrongful acts complained of, loss of support subsequent to the time when the action was begun, and any evidence fairly tending to show this, was, of course, properly admissible.

The other evidence relied upon as erroneously admitted, appears in the testimony of the appellee Emily Gustafson, and was as follows:

Q - "What was his attitude toward you and the boy when he was drunk?"
A - "He was abusive. He was very abusive."

This testimony was, of course, inadmissible for the purpose of showing damages by reason of any injury to appellees' feelings, but it was introduced in connection with a description of Gustafson's conduct when drunk which was offered for the declared purpose of showing the nature and extent of his intoxication; as it was competent for that purpose, it cannot be said to have been erroneously admitted in evidence.

We do not think the case is similar to the cases of Hackett et al v. Smelsley, 77 Ill. 109, McLees v. Niles, 93 Ill. App. 442, and Adams v. Jurich, 160 Ill. App. 522, where the testimony was not at all confined to evidence tending to show the extent of the husband's intoxication. In the Hackett and Adams cases, evidence of personal injuries and other matters which was both inadmissible, and of a kind which would naturally inflame and prejudice the jury, was introduced. In the McLees case, which is claimed to be most nearly in point, the complainant's testimony was that the husband was "ugly and abusive;" that his language was "very low and abusive." "When asked as to what led to her

all damages flowing from the fact of recovery, it
they are recovered at all; consequently, appellants were
entitled to show the fact that they were not entitled to
the wrongful acts complained of, loss of support, and
damages to the time when the action was begun, and any other
damages flowing from the fact, was, of course, properly
admissible.

The other evidence relied upon as errors was
admitted, appears in the testimony of the appellee, and

Question, and was as follows:

- Q - "What was the testimony of the witness?"
A - "He was a witness. He was a witness."

This testimony was, of course, the testimony for
the purpose of showing damages by reason of the injury to
appellee's feelings, but it was not shown in connection
with a declaration of tortious conduct, and it was not
shown for the purpose of showing damages by reason of the injury
and extent of the tortious conduct. It was not shown for the
purpose, it cannot be said to have been shown for the
in evidence.

It is not shown that the same is shown in the
of the fact of the tortious conduct, and it is not shown
in the fact of the tortious conduct, and it is not shown
where the testimony was not shown for the purpose of showing
damages by reason of the injury to the feelings of the
in the fact of the tortious conduct, and it is not shown
and other facts which were not shown for the purpose of showing
which would have been shown for the purpose of showing
introduced. It is not shown that the same is shown in the
shown for the purpose of showing damages by reason of the injury
very low and sparse." It is not shown that the same is shown

'final leaving of him,' she stated, 'about two weeks before he was very abusive and was under the influence of liquor.'" It must further be borne in mind that the court, in that case, on its own motion instructed the jury that they could consider this evidence "in determining the extent of the injury," thereby calling special attention to it. The abusive language of McLees' did not tend to injure the wife's means of support, and the court's action in instructing the jury that it could be considered in determining the extent of her injury was, of course, clearly erroneous. Moreover, in the case at bar, the appellants moved to strike the testimony on the sole ground that it was not material to any issue in the case; they did not suggest that it was prejudicial or ask that it be stricken out on that ground.

The court gave eight instructions on behalf of appellees; appellants offered forty-seven instructions, of which the court gave twenty-three. Counsel for appellants criticise each of the eight instructions given on behalf of appellees, and also the court's action in refusing to give three of the fourteen instructions rejected. [The first instruction given on behalf of ^{defendants} ~~appellants~~ is as follows:

"The court instructs the jury, as a matter of law, that it is unlawful to sell or give intoxicating liquors to an habitual drunkard or to a person when intoxicated, and you are further instructed that a sale to such person is a sale wantonly and wilfully made; so if you believe from the evidence that intoxicating liquors were sold or given to Carl Gustafson by the defendants at the time when they knew, or ought to have known, that the said Carl Gustafson was intoxicated or had become an habitual drunkard, then such sales or gifts, if any, were unlawful."

It is objected that this instruction permitted the jury to find that sales were made wantonly and wilfully, even if the appellants did not know, or had no means of knowing,

...the

that Gustafson was intoxicated or an habitual drunkard. The instruction, however, consists of but one sentence, and the portion of it beginning with the words, "so, if you believe from the evidence," made it necessary for the jury to find that the appellants knew, or ought to have known, that Gustafson was intoxicated or had become an habitual drunkard, before any recovery could be had at all.

< We do not see how any meaning can be read into the instruction other than that in order to constitute a sale wantonly and wilfully made, the jury must find that the appellants knew, or ought to have known, that Gustafson was intoxicated or had become an habitual drunkard. Counsel also object to the conclusion that, "such sales or gifts, if any, were unlawful," and contend that the unlawfulness of the sales was not an issue in the case, and that it clearly was introduced to prejudice the jury against the appellants. We are, however, of the opinion that this action is based entirely upon the alleged unlawful acts of the appellants, and that, therefore, the lawfulness or unlawfulness of appellants' conduct was the principal issue involved in the cause.

cd The second instruction, in effect, told the jury that the defendants were liable for the acts of the defendants' servants, and the instruction was admitted to be correct ordinarily, but it is said it is not correct where exemplary damages are involved. This instruction will, therefore, be considered in connection with the instructions on exemplary damages.

cd The third instruction given on behalf of appellees is criticised because "it does not limit the time when the defendants gave or sold intoxicating liquors to Mr. Gustafson to the time alleged in the declaration, and there is evidence

that instruction was intended to be left out of the
The instruction, however, contained the one sentence,
and the portion of it beginning with the words "and, if
you believe from the evidence," made it necessary for the
jury to find that the appellant knew, or ought to have
known, that Quotation was intoxicated or had become so
before any two-way could be set out.
We do not see how any jurist can be held back by the in-
struction other than that in order to constitute a crime the
and willfully made, the jury must find that the appellant
knew, or ought to have known, that Quotation was intoxicated
or had become so before any two-way could be set out.
the conclusion that "such action as this, it may, now be
lawful," and so that the appellant of the case was
not an issue in the case, and that it is a matter of
fact to establish the fact against the appellant.
are, however, of the opinion that this action is based on-
tially upon the alleged intent of the appellant to be a police-
and that, therefore, the instruction on intent is
applicable, and that the intent of the appellant in
the case.

The second instruction, which reads, "and, if you
find the defendant was intoxicated at the time of the
and, therefore, the instruction on intent is
not applicable, but it is a matter of fact
whether the defendant was intoxicated at the time of the
therefore, the instruction on intent is
on every day basis.

The third instruction, which reads, "and, if you
find the defendant was intoxicated at the time of the
and, therefore, the instruction on intent is
not applicable, but it is a matter of fact
whether the defendant was intoxicated at the time of the
therefore, the instruction on intent is
on every day basis.

in the record that Gustafson was drunk as late as two months before the trial of the case." The criticism is not valid, since there was no evidence of sales by either defendant other than those set out in the declaration, and the instruction expressly limits the jury to the sales shown by the evidence. The instruction is further criticised because it is alleged to allow a recovery for intoxication, even if it was not habitual, and it is said that the gravamen of this action was habitual intoxication. The statute, however, gives an action for damages resulting from intoxication, "habitual or otherwise," and consequently, the gravamen of the action is intoxication, and evidence which established intoxication would, therefore, support a verdict, even if it was not shown to be habitual. Where enough is proved to establish a right of action, it is no objection that more was declared upon, for the matter not proved may be treated as surplusage. The final criticism of this instruction is that it allowed a recovery for injury to appellees in their property or means of support, while the declaration only counted on injury to the latter. However, as the jury, in this instruction, are confined to what they "believe from the evidence," and as there was nothing in the evidence tending to show injury to property, the presence of the words, "in their property," does not make the instruction erroneous.

The criticism of appellees' fourth instruction is that it allows a recovery for whatever lessened Gustafson's ability to supply his family with suitable comforts, even though they might believe he had not actually failed so to supply them. We think no jury, however ingenious, could have evolved such an extraordinary meaning out of the very plain words of the instruction.

The objection made to the sixth instruction was also made to the third, and has been fully answered.

The seventh instruction is criticised because it told the jury that if they believed from all the circumstances in evidence that plaintiffs ought to recover exemplary damages, they might, if they saw fit, in addition to the actual damages, assess such further sum as exemplary damages as they believed from all the circumstances in evidence in the case that plaintiffs were entitled to. This is objected to because it does not explain to the jury in what circumstances exemplary damages were allowable. This objection, we think, is clearly not well taken, for the instruction correctly lays down a principle of law applicable to the assessment of damages in this case. It is true it did not tell the jury in what circumstances exemplary damages were allowable, and did not attempt to do so, but left that subject matter to be dealt with in the instruction which followed. It is not necessary nor customary to attempt to state all the principles of law relative to one subject matter in one instruction. The instruction which follows, undertakes to, and does, correctly define the facts and circumstances which would warrant the giving of exemplary damages, and the proper measure of such damages. In connection with this instruction eight, it is necessary to consider the criticism made in regard to the second instruction, which told the jury, in effect, that the acts of the appellants' servants were the acts of the respective appellants; it is contended that this would subject the appellants to exemplary damages, even though the appellants had forbidden the sales. We think that this criticism is not only far-fetched, but that it is not even technically correct, for the court nowhere attempted to tell the jury when

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exemplary damages could be recovered, except in the eighth instruction, and it there makes such damages depend upon a finding "that the conduct of the defendants in this regard was wanton and in wilful disregard of the plaintiffs' rights." The acts of appellants' servants did not constitute the conduct of appellants; one's conduct is personal, and depends upon personal acts. The instruction did not tell the jury that they could make an example of the appellants on account of the acts of their servants, but did tell them they could do so if their own conduct was wanton and in wilful disregard of appellees' rights. We think the giving of the second instruction, which is admitted to be correct as a matter of law, had no tendency to mislead the jury, when read in connection with the eighth instruction, which correctly instructed the jury in regard to exemplary damages.

Appellants further contend that the court erred in failing to give the second instruction offered by them in regard to exemplary damages, which, in effect, told the jury that if one defendant was guilty of conduct which would permit exemplary damages, and the other was not, then they could only assess "such damages as you find the defendant least at fault is liable for." Had the instruction told the jury that if the conduct of only one of the defendants warranted the assessment of exemplary damages, then only actual damages could have been recovered, the instruction would have been substantially correct, but the use of the words, "the defendant least at fault," made the instruction offered ambiguous and misleading, and might, in the minds of the jury, refer to the number of times drinks were sold by the one or the other, or the quantity sold. The instruction was, therefore, properly refused.

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The eighth instruction offered was also properly refused, since it told the jury that they should not consider habitual intoxication of Gustafson at any time or period other than the time or period during which it was proven by the evidence that the defendants or either of them sold or gave intoxicating liquors to him. That habits of intoxication, when once formed, have a tendency to continue, is a matter of common knowledge, and therefore it would have been improper to exclude from the jury's consideration evidence of intoxication subsequent to the time when it is shown that the defendants sold or gave intoxicating liquors to Gustafson.

The twelfth instruction offered by appellants was to the effect that no recovery could be had unless habitual intoxication was shown. We think, however, as indicated above, that under the declaration recovery could have been had for damages caused by intoxication, even though it had not been shown to be habitual.

As there appears to be no error in the rulings of the court, either in regard to the admission of evidence or the giving or refusing of instructions, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

The child in question offered no other evidence
thereof, since it said the jury that they should not con-
sider habitual intoxication a factor at any time or
period other than the time or period during which it was
proved by the evidence that the defendant or other of
them said or gave information known to him. The habits
of intoxication, when once formed, have a tendency to con-
tinue, is a matter of common knowledge, and therefore it
would have been improper to exclude from the jury's con-
sideration evidence of the extent of defendant's habit at the time
when it is shown that the defendant said or gave infor-
mation tending to establish the habit.

The defendant's testimony, given in accordance
with the effect that no recovery could be had unless
habitual intoxication was shown. The jury, however, as
indicated above, that under the facts the recovery could
have been had for damages caused by the defendant, even
though it had not been shown to be habitual.

In these respects the jury was not misled by the testimony
of the defendant, since it is shown that the defendant's testimony
on the issue of habitual intoxication, the defendant's
testimony, and the evidence of the jury.

202 T.A. 246

LOUIS WEISS,
Plaintiff in Error,

vs.

MAX GLAMITZ, AMELIA GLAMITZ,
Defendants in Error.)

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error, who was the plaintiff below, seeks to reverse a judgment against him for costs, and to obtain judgment here for \$200.00, which was the amount deposited by him as earnest money under a contract for a sale of certain property therein described. ^{The} ~~That~~ contract provided, among other things, that the land should be subject to an incumbrance of \$3,500, of which \$500.00 was to be payable in July, 1913, and the balance in 1917. Upon an examination, it appeared that the property was subject to an incumbrance of \$3,500, of which \$500.00 was payable August 7, 1914, \$500.00 August 7, 1915, and the balance in 1917, which was, of course, materially different from the incumbrance agreed upon. It further appears that the plaintiff in error gave notice to the defendants in error that he elected to stand on his contract, and must have a conveyance subject only to the incumbrance therein provided for. No such conveyance was tendered.

Parol evidence on behalf of defendants in error was offered, which tended to show that plaintiff in error agreed to a modification of the contract, and this evidence was received over the objection of plaintiff in error, apparently upon the theory that it was evidence of a waiver of a stipulation in the contract. We are, however, of the opinion that an agreement to change the terms of a contract so as to permit an incumbrance materially different from the one originally provided for, cannot, in any sense, be said to be a waiver of a condition, and that the offer of parol evidence of such an

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Journal of Management Education 30(6)

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and 1990 to 1991, 1992 to 1993, 1994 to 1995, 1996 to 1997, 1998 to 1999, 2000 to 2001, 2002 to 2003, 2004 to 2005, 2006 to 2007, 2008 to 2009, 2010 to 2011, 2012 to 2013, 2014 to 2015, 2016 to 2017, 2018 to 2019, 2020 to 2021, 2022 to 2023, 2024 to 2025, 2026 to 2027, 2028 to 2029, 2030 to 2031, 2032 to 2033, 2034 to 2035, 2036 to 2037, 2038 to 2039, 2040 to 2041, 2042 to 2043, 2044 to 2045, 2046 to 2047, 2048 to 2049, 2050 to 2051, 2052 to 2053, 2054 to 2055, 2056 to 2057, 2058 to 2059, 2060 to 2061, 2062 to 2063, 2064 to 2065, 2066 to 2067, 2068 to 2069, 2070 to 2071, 2072 to 2073, 2074 to 2075, 2076 to 2077, 2078 to 2079, 2080 to 2081, 2082 to 2083, 2084 to 2085, 2086 to 2087, 2088 to 2089, 2090 to 2091, 2092 to 2093, 2094 to 2095, 2096 to 2097, 2098 to 2099, 2100 to 2101, 2102 to 2103, 2104 to 2105, 2106 to 2107, 2108 to 2109, 2110 to 2111, 2112 to 2113, 2114 to 2115, 2116 to 2117, 2118 to 2119, 2120 to 2121, 2122 to 2123, 2124 to 2125, 2126 to 2127, 2128 to 2129, 2130 to 2131, 2132 to 2133, 2134 to 2135, 2136 to 2137, 2138 to 2139, 2140 to 2141, 2142 to 2143, 2144 to 2145, 2146 to 2147, 2148 to 2149, 2150 to 2151, 2152 to 2153, 2154 to 2155, 2156 to 2157, 2158 to 2159, 2160 to 2161, 2162 to 2163, 2164 to 2165, 2166 to 2167, 2168 to 2169, 2170 to 2171, 2172 to 2173, 2174 to 2175, 2176 to 2177, 2178 to 2179, 2180 to 2181, 2182 to 2183, 2184 to 2185, 2186 to 2187, 2188 to 2189, 2190 to 2191, 2192 to 2193, 2194 to 2195, 2196 to 2197, 2198 to 2199, 2200 to 2201, 2202 to 2203, 2204 to 2205, 2206 to 2207, 2208 to 2209, 2210 to 2211, 2212 to 2213, 2214 to 2215, 2216 to 2217, 2218 to 2219, 2220 to 2221, 2222 to 2223, 2224 to 2225, 2226 to 2227, 2228 to 2229, 2230 to 2231, 2232 to 2233, 2234 to 2235, 2236 to 2237, 2238 to 2239, 2240 to 2241, 2242 to 2243, 2244 to 2245, 2246 to 2247, 2248 to 2249, 2250 to 2251, 2252 to 2253, 2254 to 2255, 2256 to 2257, 2258 to 2259, 2260 to 2261, 2262 to 2263, 2264 to 2265, 2266 to 2267, 2268 to 2269, 2270 to 2271, 2272 to 2273, 2274 to 2275, 2276 to 2277, 2278 to 2279, 2280 to 2281, 2282 to 2283, 2284 to 2285, 2286 to 2287, 2288 to 2289, 2290 to 2291, 2292 to 2293, 2294 to 2295, 2296 to 2297, 2298 to 2299, 2300 to 2301, 2302 to 2303, 2304 to 2305, 2306 to 2307, 2308 to 2309, 2310 to 2311, 2312 to 2313, 2314 to 2315, 2316 to 2317, 2318 to 2319, 2320 to 2321, 2322 to 2323, 2324 to 2325, 2326 to 2327, 2328 to 2329, 2330 to 2331, 2332 to 2333, 2334 to 2335, 2336 to 2337, 2338 to 2339, 2340 to 2341, 2342 to 2343, 2344 to 2345, 2346 to 2347, 2348 to 2349, 2350 to 2351, 2352 to 2353, 2354 to 2355, 2356 to 2357, 2358 to 2359, 2360 to 2361, 2362 to 2363, 2364 to 2365, 2366 to 2367, 2368 to 2369, 2370 to 2371, 2372 to 2373, 2374 to 2375, 2376 to 2377, 2378 to 2379, 2380 to 2381, 2382 to 2383, 2384 to 2385, 2386 to 2387, 2388 to 2389, 2390 to 2391, 2392 to 2393, 2394 to 2395, 2396 to 2397, 2398 to 2399, 2400 to 2401, 2402 to 2403, 2404 to 2405, 2406 to 2407, 2408 to 2409, 2410 to 2411, 2412 to 2413, 2414 to 2415, 2416 to 2417, 2418 to 2419, 2420 to 2421, 2422 to 2423, 2424 to 2425, 2426 to 2427, 2428 to 2429, 2430 to 2431, 2432 to 2433, 2434 to 2435, 2436 to 2437, 2438 to 2439, 2440 to 2441, 2442 to 2443, 2444 to 2445, 2446 to 2447, 2448 to 2449, 2450 to 2451, 2452 to 2453, 2454 to 2455, 2456 to 2457, 2458 to 2459, 2460 to 2461, 2462 to 2463, 2464 to 2465, 2466 to 2467, 2468 to 2469, 2470 to 2471, 2472 to 2473, 2474 to 2475, 2476 to 2477, 2478 to 2479, 2480 to 2481, 2482 to 2483, 2484 to 2485, 2486 to 2487, 2488 to 2489, 2490 to 2491, 2492 to 2493, 2494 to 2495, 2496 to 2497, 2498 to 2499, 2500 to 2501, 2502 to 2503, 2504 to 2505, 2506 to 2507, 2508 to 2509, 2510 to 2511, 2512 to 2513, 2514 to 2515, 2516 to 2517, 2518 to 2519, 2520 to 2521, 2522 to 2523, 2524 to 2525, 2526 to 2527, 2528 to 2529, 2530 to 2531, 2532 to 2533, 2534 to 2535, 2536 to 2537, 2538 to 2539, 2540 to 2541, 2542 to 2543, 2544 to 2545, 2546 to 2547, 2548 to 2549, 2550 to 2551, 2552 to 2553, 2554 to 2555, 2556 to 2557, 2558 to 2559, 2560 to 2561, 2562 to 2563, 2564 to 2565, 2566 to 2567, 2568 to 2569, 2570 to 2571, 2572 to 2573, 2574 to 2575, 2576 to 2577, 2578 to 2579, 2580 to 2581, 2582 to 2583, 2584 to 2585, 2586 to 2587, 2588 to 2589, 2590 to 2591, 2592 to 2593, 2594 to 2595, 2596 to 2597, 2598 to 2599, 2600 to 2601, 2602 to 2603, 2604 to 2605, 2606 to 2607, 2608 to 2609, 2610 to 2611, 2612 to 2613, 2614 to 2615, 2616 to 2617, 2618 to 2619, 2620 to 2621, 2622 to 2623, 2624 to 2625, 2626 to 2627, 2628 to 2629, 2630 to 2631, 2632 to 2633, 2634 to 2635, 2636 to 2637, 2638 to 2639, 2640 to 2641, 2642 to 2643, 2644 to 2645, 2646 to 2647, 2648 to 2649, 2650 to 2651, 2652 to 2653, 2654 to 2655, 2656 to 2657, 2658 to 2659, 2660 to 2661, 2662 to 2663, 2664 to 2665, 2666 to 2667, 2668 to 2669, 2670 to 2671,

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[The following information was obtained from a review of records maintained by the FBI.]

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< agreement is an obvious attempt to vary the terms of a written document by parol. Such evidence is clearly inadmissible for such a purpose. (Becker v. Becker, 250 Ill. 117.) The plaintiff in error was not in default, and as no offer of performance was made by the defendants in error within the time stipulated for in the contract, he was entitled to recover the earnest money deposited. In view of the fact that there is no dispute in regard to that amount, the judgment of the Municipal Court will be reversed and judgment entered here for \$200.00 and interest at five per cent. from February 20th, 1915, when the judgment in the Municipal Court was entered.

REVERSED AND
JUDGMENT HERE.

The following information was obtained from the records of the
 Bureau of the Census, Department of Commerce, for the years 1947
 through 1954, inclusive, regarding the number of persons who
 were employed in the United States in the various occupations
 listed in the following table:

88 - 21474.

G. E. CLINTON,

Defendant in Error,

vs.

RHODA ROYAL,

Plaintiff in Error.

203 I.A. 248

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error seeks to secure the reversal of a judgment entered against him on a directed verdict, on two judgment notes ^{for \$150 each} drawn by him and made payable to one Seaver, and by him endorsed in blank. The evidence discloses that the notes were placed in the hands of defendant in error by her husband after maturity, and for no consideration whatever. It therefore clearly appears that so far as she is concerned, she is charged with notice of any defenses pleadable against the payee, unless she gained her title to the notes from a person standing in the position of a bona fide purchaser for value without notice. A careful examination of the record, however, fails to show that there was any intermediate endorsee: the husband of defendant in error did not testify that he had ever been the owner of the notes, and the evidence as a whole tends strongly to show that in turning them over to her, he was acting for the payee. In no event, moreover, could it be said that the evidence showed him to be an intermediate endorsee so conclusively as to warrant the judge in giving a peremptory instruction, if the question of whether he was or was not, was a material element in the case. For the purpose of determining whether the judgment upon the directed verdict may be affirmed, it is necessary, therefore, to proceed upon the theory that the defendant in error did not stand in the position of a bona fide purchaser for value, without notice, since the evidence is plainly insufficient to sustain a peremptory instruction

2081A.348

88 - 2144

G. H. CLINTON

Defendant in error.

WILLIAM ROYAL

vs.

WILLIAM ROYAL

WILLIAM ROYAL

Plaintiff in error.

MR. JUSTICE THOMAS delivered the opinion of the court.

The plaintiff in error seeks to secure the

reversal of a judgment entered against him on a verdict

verdict, on two highest notes given to him and made payable

to one Sawyer, and by his request to issue the verdict

disclosed that the notes were given to the hands of defendant

in error by his husband after maturity, and for no consideration

whatsoever. It therefore clearly appears that he was an

and is concerned, and in that it is a matter of very defense

pleadable against the jury, unless the verdict was made to

the notes from a person named in the verdict as having

the purchase for value without notice concerning the in-

tion of the notes, Sawyer, and it is not shown that the

information was given to the jury in error the

not really that it was a matter of defense, and the

and the evidence was a matter of defense, and the

turned them over to her, and it is not shown that the

no error, however, and it is not shown that the

him to be an interested person or one of the parties

warrant the fact is that a reasonable investigation of the

question of whether or not the notes were given to him

in his name, or the name of the defendant, it is the

judgment upon the facts, and it is not shown that the

necessary, the jury, in reaching its verdict, was

defendant in error did not stand in the way of the

life purchaser for value, without notice, and it is

is plainly inconsistent to require a peremptory instruction

based upon the assumption that she did.

[The notes in question were judgment notes signed by the plaintiff in error and on the back of each, appeared the following order:

"Chicago, Ill. March 14th, 1914.
Treasurer,
Young Buffalo Wild West Co.
Please pay to the order of Vernon C. Seaver Two
Hundred and Fifty (\$250.00) Dollars, and charge same
to my 1913 account.
Rheda Royal."

The date and the amount named in these orders are identical with the date and the amount named in the promissory notes ^{defendant}
The ~~plaintiff in error~~ testified that the Young Buffalo Wild West Company owed him \$1,700 for services during the year 1913; that he considered Seaver as the owner of the show; that he had done all his business with him; that at the time the notes were made, Seaver gave him \$500.00 on account, and expressly agreed to look to the show for reimbursement, and that ~~plaintiff in error~~ ^{defendant} would not have to pay the notes; that he (Seaver) would get the \$500.00 from the show; that the ~~plaintiff in error~~ ^{defendant} was about to attach the show for the amount due him, and that Seaver advanced the \$500.00 with the tacit understanding that the attachment would not be made, and that it was not made, and that he credited the account of the show with the \$500.00 which he had received. All of this testimony was stricken out. Counsel for ~~plaintiff in error~~ ^{defendant} also made the ##### following offer:

"Your Honor, I want to show the schedules filed and sworn to on behalf of the Wild West Company, a corporation in bankruptcy, that they scheduled their indebtedness to this defendant at \$1700, showing the payment less the \$500 which appears upon these notes."

This offer was objected to, and the evidence excluded as immaterial.]

based upon the information in the file

in the file in question was the same as

signed by the individual in question, and on the basis of which

appearing in the file was the same as

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The contention that the notation upon the back of the notes rendered them conditional, is untenable, since it clearly falls within section three of the Negotiable Instrument Law of 1907, which provides that "An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with: (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount." (Hurd's Rev. Statutes, 1913, p. 1676.)

We are further of the opinion that the testimony of ~~plaintiff in error~~^{defendant} in regard to the conversation had at the time the notes were executed was inadmissible for the purpose of varying the terms of the notes themselves, or of showing an agreement that ~~plaintiff in error~~^{defendant} would not be liable according to their terms. (Miller v. Wells, et al., 46 Ill. 46; Mumford v. Tolman, 157 Ill. 258; Hensley v. Mitchell, 147 App. 161; Stozky v. Robe, et al., 189 Ill. App. 540.) While the rule laid down in these authorities unquestionably works a hardship in many cases, there is no doubt about the soundness of the reasons which induced its adoption, or of its applicability to the present case.

We are, however, of the opinion that the court erred in excluding the documentary evidence offered for the purpose of showing that the schedules filed showed that the indebtedness to the plaintiff in error had, by the payment of \$500.00, been reduced from \$1,700 to \$1,200, especially in view of the undisputed testimony to the effect that the entire management and control of all the affairs of the bankrupt company were in the hands of the payee of the note. The order upon the back of the notes entitled the holder to receive from the treasurer of the company the full face value

The condition that the parties agree to
back of the notes remained their condition, it is undeniable
since it clearly falls within section three of the Negotiable
Instrument Law of 1917, which provides that "an instrument
order or promise to pay in negotiable form with the words
of this act, though couched within (1) an order of a
particular fund out of which payment is to be made, or
a particular account to be debited and the amount," is a
Negotiable Instrument, 1917, c. 10, § 3.

We are further of the opinion that the
of plaintiff's action is barred by the statute of limitations
time the notes were executed and the statute of limitations
of varying the terms of the notes themselves, or of the
an agreement that ~~the notes~~ would not be paid,
according to their terms, 111 N. E. 2d 111,
44: 111 N. E. 2d 111, 111: 111 N. E. 2d 111,
App. 111: 111 N. E. 2d 111, 111: 111 N. E. 2d 111,
the rule laid down in that case, which is applicable to
a hardship in many cases, where it is not applied to
cases of the present kind, where the hardship is
applicability to the present case.

It is further of the opinion that the
error in claiming that the notes were not paid
purpose of showing that the notes were not paid
indirectly, to the effect that the notes were not paid
\$200.00, but without any other evidence to show that
view of the undisputed facts, the court should have
management and control of the notes, and the court
company were not to be paid, and the court should
order in the notes, and the court should have
receive from the bank the money of the notes, and the court

of the notes, and if the payee did receive the funds in accordance with the terms of the orders, this acted as payment of the notes. The payee could not, of course, credit the company's indebtedness to the plaintiff in error with the payment of \$500.00, without extinguishing the notes upon which the orders were endorsed. While a bankruptcy schedule stating the indebtedness to be \$1,800, instead of \$1,700, was not, of course, conclusive, it was some evidence, at least, that the credit had been made and therefore it should have been admitted. For this reason, we are of the opinion that the case must be reversed and remanded to the Municipal Court for a new trial.

REVERSED AND REMANDED.

of the notes, and if the paper did receive the same in accordance with the terms of the contract, it is dated as payment of the notes. The paper would not be returned until the company's indebtedness to the plaintiff is covered with the payment of \$700.00. If the plaintiff is the owner of the notes which the company were to receive, this is a bankruptcy schedule listing the indebtedness to be \$1,100 instead of \$1,700. The \$600 of balance, which is the some evidence, at least, that the credit was not made and therefore it should have been the same. It is possible we are of the opinion that the notes were to be returned and returned to the plaintiff at least \$700.00.

100 - 21490.

203 I.A. 250

BRIDGET CORRIGAN,

Defendant in Error,

vs.

NORTH AMERICAN UNION,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

X
cd
The plaintiff in error seeks the reversal of a judgment against it, entered in favor of defendant in error, on a benefit policy issued to one George Whelan. The substance of the defense was that the policy was issued subject to the rules of plaintiff in error, which prohibited its members from engaging in the occupation of bartender; that the insured had, during several months engaged in that occupation, and that in consequence, the policy was void. At the close of the evidence plaintiff in error asked the court to find that the insured had "engaged in an occupation prohibited by the laws of the defendant, namely, a bartender, while he was a member of the defendant." This the court refused to do. It is contended that this action of the court was erroneous. The testimony offered on behalf of plaintiff in error tended to show that at times during the months of February, March, and April, 1913, the insured had served intoxicating liquors in the saloon of his brother. Numerous witnesses were called on the other side, whose testimony tended to show that he had not done so. While this latter evidence was largely of a negative character, the testimony of the insured's brother, who was the owner of the saloon, was that his brother was not engaged in his saloon; that he never employed him as a bartender or paid him wages or salary as bartender; that he was, during the months described, "hanging around" in his saloon; that he did not serve any

drinks with his knowledge; that he (the witness) tended bar himself; that he never saw the insured serving any drinks at the bar; that he was there every day; that the condition of the insured's health at that time was such that he was just able to sit up; that he never authorized his brother to go behind the bar and sell beer; that he had a bartender in his employ during all those months, and that the insured would come into his saloon once or twice a day, and not at any definite hours. As the witness was the proprietor of the saloon, and in active charge of it, he was in a position to have definite information in regard to the matter. In view of this testimony, we are unable to say that the trial judge, who heard the witnesses, erred in failing to find that the insured had engaged in the prohibited occupation.

We are unable to say that casual sales of liquor, made from time to time in a brother's saloon by one not employed for the purpose and receiving no compensation therefor, would, as a matter of law, constitute the one who made the sales a person engaged in the occupation of bartender. As no other assignment of error is relied upon, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

think with his knowledge; that is (the witness) could not
himself; that he never saw the person carrying out this
at the bar; that he was in the room at the time of the
of the person's death at that time and he was
that able to sit up; that he never saw any of the person
to go behind the bar and sell beer; that he had a conversation
in his employ during all those months and that the person
would come into his saloon once or twice a day, and that
any definite hours. As the witness was a conversational
the saloon, and in order to change of it, he is in a position
to have definite information in regard to the person. In
view of this testimony, he was able to say that the fatal
Judge, who heard the evidence, must be willing to find
that the person had no need for the prohibited possession.
We are unable to say that the usual rules of law, and that
time to time in a person's action is one of the law for
the purpose and according to the person's interest, and
as a matter of law, considering the one who made the order
a person engaged in a conversation of confidence, he is
other and must be taken as well as the person, and the person of
the person's name will be sufficient.

161 - 21553.

203 I.A. 251

EDWARD HUDSON,
Defendant in Error,

vs.

BEN MARKS, D. S. MARKS,
EMANUEL MENDELSON and
I. LIPSEY,
Plaintiffs in Error.)

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

X

The plaintiffs in error sued out this writ for the purpose of reviewing the action of the Municipal Court in denying their motion to vacate a judgment against them, entered by confession under a power of attorney, reserved to the defendant in error in a lease. The only defendants in the court below who made a motion to set aside the judgment, were the lessees. [It appears from the lease that it was assigned, with the consent of the lessor, ^{defendant} who is the defendant in error ^{defendant} here, to the plaintiff in error Mendelson, and afterwards re-assigned to plaintiff in error Lipsey, but by the terms of the assignment, the original lessees remained bound by the terms of the lease. The affidavit upon which the lessees ^{defendants} (plaintiffs in error) based their motion set out that the assignees of the lease used the premises as a house of ill fame; "that the use of said premises by said Lipsey and by said Mendelson for such immoral and illegal purposes was with full notice and knowledge thereof on the part of the plaintiff herein; that the plaintiff accepted certain payments of rent knowing the money so paid to him was the proceeds of the unlawful and immoral uses to which said premises were devoted as aforesaid."]

Plaintiffs in error contend that the matters thus set up constituted a defense to the action on the lease, and that the Municipal Court should have opened up the judgment for the purpose of allowing that defense to be made. While it is true that it is a defense to an action on a lease or other contract

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that it was made for an illegal or immoral purpose, yet, no authority is cited which sustains the proposition that an action on a lease not shown to have been made for an illegal purpose can be defeated by showing that the lessor had received rent with a knowledge that they had been so used. In support of their contention, counsel for plaintiffs in error cite Fields v. Brown, 188 Ill. 111. In that case, however the lessor leased the premises with a full knowledge that they were to be used as a house of ill fame, and for that reason the court held the lease illegal and non-enforceable. Moreover, the affidavit relied upon here, failed to state that the premises were used for illegal purposes with the consent of the lessor, or that he permitted them so to be used. The recital, "that the use of said premises by said Lipsey and by said Mendelson for such immoral and illegal purposes was with full notice and knowledge thereof on the part of the plaintiff herein," would be true even if his knowledge was acquired on the last day or hour that the premises were used for such a purpose. That he accepted payments of rent, knowing that the money was the proceeds of the immoral uses, is also immaterial in the absence of a showing that he had acquiesced in such use, or permitted the occupants to continue to use it for such a purpose. The action of the court in refusing to set aside a judgment by confession will not be reviewed unless the affidavit upon which it is based sets out facts which, if true, would in themselves constitute a defense. In Chicago Fire Proofing Co. v. The Park National Bank, 145 Ill. 481, the court said, page 487:

that is to say, the whole of the world is now in a state of
anarchy and confusion.

It is a state of things which has never before existed in the
history of the world.

The cause of this state of things is the war which has been
going on for many years.

The war has been going on for many years, and it is now
reaching its climax.

The war has been going on for many years, and it is now
reaching its climax.

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reaching its climax.

The war has been going on for many years, and it is now
reaching its climax.

< "In an application of this character, to vacate a judgment and for leave to plead, affidavits filed in support of the motion are to be construed most strongly against the party making the application. It is not sufficient to state facts from which, if proved on a trial, a defense might be inferred. Crossman v. Wohlleben, 90 Ill. 537."

When tested by this rule, the affidavit appears to be clearly insufficient and we are, therefore, of the opinion that the trial court did not err in denying the motion to open up the judgment and allow plaintiffs in error to plead.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

"In an application of this to the case of
Lorraine, it is suggested that the evidence
concerning her activities should be taken
into consideration. It is suggested that
Lorraine should be given a hearing, and
that the evidence should be taken into
consideration. Proceedings Chicago Ill. 1937."



When faced by this evidence, the court should be clearly
impressed that the evidence is not only
clearly in favor of Lorraine, but also
the judgment and will of the court should be
The judgment of the court should be in favor of Lorraine.

199 - 21592.

FRANK ALFORD,
Defendant in Error.

vs.

ANTONIA LAMBERT,
Plaintiff in Error.

203 I.A. 256

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Plaintiff in error seeks to review the action of the Municipal Court in entering judgment against her in favor of defendant in error for \$836.00 claimed to be due for work as janitor for twenty months at \$35.00 a month, and other items, including \$21.00 of borrowed money. Liability for the item of \$21.00 was admitted, but denied as to the remainder.

Defendant in error testified that he built two flues in plaintiff in error's flat building, for which she agreed to pay him \$40.00; that he did some tuck pointing, for which she was to pay him \$15.00, and that he worked for her for twenty months as janitor, for which she agreed to give him \$35.00 a month; that the building had fifteen flats and a basement; that during the twenty months, she gave him his board and room. Plaintiff in error denied that she agreed to pay him anything, and stated that she gave him his board and allowed him to sleep in one of the flats, and that he sat at the table with plaintiff in error and her husband. She testified that her husband worked in the building, fired the furnace, cleaned the steps, and sometimes carried the garbage down.

One Flizikowski, called by the plaintiff in error, testified that he had been an architect in Chicago for twenty years; that he had known defendant in error for forty years, and that defendant in error told him that he was working for his board and lodging, and did not get any wages.

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A social worker with the Legal Aid Society testified that defendant in error came to the Legal Aid Society to have suit begun against plaintiff in error; that he told her then that he was working for plaintiff in error at the rate of \$5.00 a month.

✓ The main issue, therefore, was as to whether plaintiff in error had agreed to pay defendant in error anything for his services, outside of his board and lodging, and if so, how much. There was a direct conflict of evidence, and plaintiff in error was entitled to produce any competent evidence which would tend to support her contention. Plaintiff in error called her husband as a witness, and he was asked, "How much work did he do, and how much work did you do?" Objection was made that he was not competent. The court, without directly passing upon that question, said that defendant in error was contending "that he was getting \$35.00 a month, and how much work he did or did not do, does not cut any figure," and sustained the objection. As the matter in controversy concerned the wife's separate estate, her husband was a competent witness. The amount of work which defendant in error did during the twenty months he was with plaintiff in error was a matter which the plaintiff in error had a right to present to the jury for its consideration in determining the probability or improbability of his testimony that she had agreed to pay him \$35.00 a month. We are, therefore, of the opinion that the evidence was improperly excluded, and for that reason, the cause will be reversed and remanded to the Municipal Court for a new trial.

REVERSED AND REMANDED.

227 - 21622.

JOHN FORLER,
Plaintiff in Error,
vs.
E. R. BUTTS,
Defendant in Error.)

203 I.A. 257

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

+ The plaintiff in error brought suit on two promissory notes aggregating \$590.00, and now sues out this writ of error to reverse a judgment in favor of the defendant in error. ~~The evidence disclosed that~~ these checks were given on a Monday, and that plaintiff in error failed to deposit them in the bank in Chicago until Wednesday or Thursday, and that this resulted in a failure to present them to the bank in Niles, Michigan, on which they were drawn until Saturday, the day the bank closed its doors. ~~The evidence also shows that~~ The defendant in error had on deposit with the bank at the time of its failure, an amount in excess of the amount of the checks. The evidence further disclosed that it takes about two and a half hours to travel by rail from Chicago, where the transaction took place, to Niles, Michigan. ~~As the failure of the plaintiff in error to present the checks for payment within a reasonable time resulted in a loss to the maker of the checks, it constituted a payment or extinguishment of the debt for which the checks were drawn.~~ (Brown v. Schintz, 202 Ill. 500.)

apl Plaintiff in error, however, contends^{ed} that as the defendant in error wrote him on the day of the bank's failure, saying that he hoped the checks had been paid, and if not, he, ~~(the defendant, in error)~~ was out that amount, and also in a conversation with plaintiff in error, agreed to give a note for the amount of the checks, that these promises

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revived defendant ^{1/2}in error's obligation without any further consideration, and that it was immaterial whether defendant in error knew that by the rules of law the negligence of plaintiff in error to deposit the checks promptly would discharge him. In support of this contention, counsel cite Morgan v. Peet, 41 Ill. 347, but in that case, the court expressly adhered to the doctrine which it had laid down in the same case when it had previously been before it, reported in 32 Ill. 281, where it had said, page 288:

"The rule, we believe to be, in such case, that if an indorser makes a new promise when he believed he was liable, it is for the plaintiff to prove that he knew the facts which would discharge him, and this knowledge may be shown by facts and circumstances.

"The law presumes that all men know the law, but not the facts; hence a plaintiff seeking to recover in such case must show by sufficient proof of facts and circumstances, or otherwise, that the party sought to be charged on his promise knew the facts of his release."

In Walker v. Rogers, 40 Ill. 278, the court said, page 280:

< "It is also insisted that the drawers waived the laches by a subsequent promise. The language used was equivocal, but, admitting that the partner who used it intended to be understood as promising payment, there is no evidence that, when he made the alleged promise, he knew that the holder had failed to present the bill at maturity, or to give due notice of non-payment. Unless it appears that the new promise was made with a full knowledge of the facts out of which the discharge of the drawer has arisen, such promise is no waiver. The burden of making this proof is upon the plaintiff."

The evidence fails to show that at the time the defendant in error made the statements relied upon, he had knowledge of the facts out of which his discharge had arisen; it therefore follows that he was entitled to judgment.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

revived defendant's obligation without any further consideration, and that it was a material breach of the contract. The court found in favor of the defendant, and the plaintiff's motion for summary judgment was denied. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied.

"The rule, as stated in the case, is that a party who is not a party to a contract cannot sue on it. The court found that the plaintiff was not a party to the contract, and therefore, it was not entitled to sue on it. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied.

In Smith v. Jones, 100 F.2d 123, 10 S.Ct. 123, 138 F.Supp. 123, the court held that a party who is not a party to a contract cannot sue on it. The court found that the plaintiff was not a party to the contract, and therefore, it was not entitled to sue on it. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied.

"It is well settled that a party who is not a party to a contract cannot sue on it. The court found that the plaintiff was not a party to the contract, and therefore, it was not entitled to sue on it. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied.

The court found that the plaintiff was not a party to the contract, and therefore, it was not entitled to sue on it. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied. The court also found that the defendant's conduct was not a breach of the contract, and the plaintiff's motion for summary judgment was denied.

Attorney.

311 - 21707.

CITY OF CHICAGO,

Defendant in Error

vs.

J. J. MOSER,

Plaintiff in Error.)

203 I.A. 259

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error, who will be referred to as defendant, seeks to reverse a judgment against him for \$1.00 and costs, entered against him for an alleged breach of section 2012 of the Municipal Code, which, in effect, provides that all persons who shall make, aid, countenance, or assist in making any form of noise, riot, disturbance, breach of the peace, or a diversion tending to a breach of the peace, within the limits of the City of Chicago, shall be subject to a fine of not less than \$1.00 nor more than \$200.00. The sole question before the jury was as to whether the defendant had been guilty of such an offense.

The evidence disclosed that the defendant, on the day in question, presented himself at the entrance to the Kedsie station of the Chicago & Northwestern Railroad, and offered his ticket for inspection, but refused to allow the collector to punch it. It sufficiently appears from the evidence that it was not customary to require a ticket to be punched until the passenger had boarded the train, but that on account of unusual and extraordinary congestion of traffic, collectors were placed at the entrance to the station, and that they punched the tickets of the passengers as they passed through the gates. The defendant passed through the gate, apparently without the use of any force, but declining to permit his ticket to be punched, upon the ground that the railroad company had no right to insist upon a cancellation of a fare until it was apparent that transportation would be

208 I.A. 259

311 - 21000

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furnished him.

The first witness called on behalf of the City testified to an occurrence supposed to have happened the previous day. On cross-examination defendant asked the witness when he started to work at the station, which was, of course, proper, in view of the fact that he had testified to an occurrence on the previous morning. When an objection to this question was sustained, defendant said, "This is cross-examination." Thereupon, the court said, "Never mind now. What do you think it is? An oyster stew?" The subsequent examination disclosed that the witness had not seen the occurrence on the preceding day in regard to which he had testified. Thereupon, the defendant moved to strike it from the record, but the court said, "No, it won't be stricken from the record." When the defendant attempted to ask a witness a question on cross-examination, the court interrupted, saying, "What are you trying to do, kill time?" Defendant: "No, your Honor." The Court: "Well, then, why don't you ask the questions?" Defendant: "I am trying to get a record in this case, if your Honor please." The Court: "Never mind the record; ask your questions. Are you getting ready for a damage suit?" Defendant: "No, your Honor." The Court: "Well, then, go ahead. This man told you that he did not see you after the time he saw the officer. Now stop the cross-examination there; we aren't trying the railroad you know." Defendant: "If this jury believes - " The Court: "Never mind what the jury believes; you ought to know how to try this case." Defendant: "But it makes a difference to me - " The Court: "It possibly makes a difference to you. I don't know what difference it makes to you or what it doesn't make to you."

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In view of the court's refusal to strike out the hearsay evidence admitted on behalf of the City, and the obviously improper and prejudicial remarks of the presiding judge, it is necessary to reverse the judgment of the Municipal Court, but upon a review of all the evidence in the case, we are clearly of the opinion that no evidence was introduced which could fairly be said to establish the charge of a violation of the ordinance in question. The defendant, in possession of a ticket which entitled him to become a passenger on the line of the railroad company, passed through its gates, apparently without force, under a claim of right apparently asserted in good faith. The railroad in question had the right to make reasonable rules and regulations for the conduct of its business, and if entrance to its station was claimed in contravention to such a rule, it had the right to exclude the person attempting to enter and if a person entered in violation of such a rule or regulation, obviously, he became a trespasser, and it was the right of the company to eject him, using no more force than was necessary, notwithstanding the fact that the person entering may have done so under reliance upon a claim of right made in good faith. But a trespass, especially when made under a claim of right, is not necessarily of itself a violation of the terms of the ordinance in question, and we are of the opinion, as indicated above, that there is nothing in the record which establishes such a violation. The main reliance of counsel for the City is that the bill of exceptions is imperfect, since it does not include a copy of the ordinance sued upon. The presiding judge, however, in his instructions to the jury stated the substance of so much of the ordinance as was applicable to the case, and to this instruction the

In view of the court's decision, it is clear that the
the Henry's evidence is not sufficient to establish the
obviously improper and prejudicial nature of the evidence.
Judge, it is necessary to reverse the judgment of the trial
court, and upon a review of all the evidence in the case,
are clearly of the opinion that a judgment was warranted
which would fairly be said to be based upon the evidence of a
view of the entire case in the light of the facts. In the
of a ticket which entitled him to board a passenger car
line of the railroad company, and the ticket was not
entirely without force, and a ticket which is not
in good faith, and is not a valid ticket, and the
reasonably, and the evidence in the case is not
none, and it is necessary to reverse the judgment of the
version to such a ticket, and the evidence in the case is
attempting to establish that the ticket was not a valid
such a ticket as required, and the evidence in the case is
and it is the opinion of the court that the evidence in the
more force than the evidence in the case, and the evidence
the person presenting the ticket, and the evidence in the
claim of right, and the evidence in the case is not
when such a ticket is presented, and the evidence in the
a violation of the terms of the ticket, and the evidence
and the evidence in the case is not sufficient to establish
in the case, and the evidence in the case is not
reliance of the court, and the evidence in the case is
is a violation of the terms of the ticket, and the evidence
and upon the evidence in the case, and the evidence in the
no the fact that the evidence in the case is not
as was applicable to the case, and the evidence in the case

City neither made nor preserved an exception. Moreover, the offense for which the defendant was tried is fully disclosed by the sworn complaint filed in the Municipal Court, and by the statement of counsel for the City, which is preserved in the bill of exceptions, and by which it is bound.

In view of the fact that we are of the opinion that the record does not disclose evidence fairly tending to show a violation of the ordinance in question, the judgment of the Municipal Court is reversed.

REVERSED.

did neither make nor prosecute an execution. Those who the
offense for which the defendant was tried is first indicated
by the sworn complaint filed in the District Court, and
by the statement of counsel for the State which is preserved
in the bill of exceptions, and by which it is shown.

In view of the fact that the record does not disclose evidence
tending to show a violation of the provisions of the
the judgment of the District Court is reversed.

33 - 21275

HENRY WEISS and SAMUEL S.
SCHWARTZ,

Defendants in Error,

vs.

S. A. CORN,

Plaintiff in Error.

244/
203 I.A. 261

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 24, 1914, Benjamin Siegel and Samuel Schwartz brought suit, in a fourth class case, in the Municipal Court against the plaintiff in error (hereinafter called the defendant) for \$942.85 for goods sold and delivered. Subsequently the names of the plaintiffs were changed to Henry Weiss and Samuel S. Schwartz. The defense asserted was that in May 1914, an oral contract was made between the parties which provided that:

"* **the defendant agreed to purchase from said firm and said firm agreed to sell and deliver to defendant certain goods, wares and merchandise; that said contract contained a provision that said goods, etc., were to be billed and charged to defendant at certain prices and that defendant was to endeavor to sell and dispose of said goods, etc., from time to time as delivered by said firm and received by defendant, to customers of defendant; that such of said goods, etc., as were accepted and paid for by said customers of defendant were to be paid for by defendant to said firm, and that such of said goods, etc., as were not accepted and paid for by said customers of defendant were to be by defendant returned to said firm, and said firm was to accept or receive back such goods, etc., as defendant was unable to sell and the account of defendant credited accordingly by said firm."

2021 A. 261

HENRY WEISS and SCHWARTZ,
Defendants in Error.

vs.

THE CHICAGO TRADING COMPANY,
Plaintiff in Error.

vs.

U. S. COURT,
District of Columbia.

Plaintiff in Error.

THE JUSTICE COURT delivered the opinion of the

court.

On December 24, 1914, Defendant called the Chicago

Schwartz through plaintiff, in a bill of exchange, in the

Municipal Court against the plaintiff in error (plaintiff)

called the defendant for \$542.85 for goods sold and delivered

to. Subsequently the name of the plaintiff was changed

to Henry Weiss and (and) J. Schwartz. The defense appears

was that in May 1914, an oral contract was made between the

parties which provided that:

"**The defendant agreed to purchase from
this firm and said firm agreed to sell and deliver
to defendant certain goods, wares and merchandise;
that said contract contained a provision that said
goods, etc., were to be delivered and shipped to the
defendant at certain prices and said defendant was
to endeavor to sell and dispose of said goods, etc.,
from time to time as delivered by said firm; that
received by defendant, to purchase or otherwise;
that such of said goods, etc., as were received and
paid for by said defendant or otherwise were to be
paid for by defendant to said firm, and that even
of said goods, etc., as were not received and paid
for by said defendant or otherwise were to be paid
defendant to said firm, and that said firm was
to accept or receive back such goods, etc., as
defendant was unable to sell and dispose of;
defendant agreed accordingly to sell said firm."

On motion of plaintiffs, the case was placed on the short course calendar; and to avoid the delay that would be caused by taking depositions of witnesses for the defendant, the plaintiffs agreed that certain witnesses would testify according to the contents of certain affidavits, and that the affidavits should be admitted in evidence in place of the personal testimony of the witnesses.

Although the defendant had demanded a jury trial, the latter was then waived and, on February 2, 1915, the case was tried before the court without a jury. The evidence on the part of the plaintiffs consisted of the testimony of Weiss (one of the plaintiffs) and certain exhibits; the evidence on the part of the defendant consisted of the testimony of the defendant, Corn, and the affidavits of Laidhold, Mooney and Glassgold, which latter were received by agreement as the equivalent of their testimony. At the close of the evidence the counsel for the defendant requested certain findings of fact and of law, which the court refused. Upon a motion by the defendant for a finding for the defendant, (the cause being submitted without argument) the following colloquy occurred;

"The Court: I do not see what else I can do but allow the motion. If the only witnesses in this case were the parties themselves it would be hard to decide, but what is the court going to do about these affidavits here? I never saw these affidavits until I read them just now. I am surprised that counsel for the plaintiffs admitted them in evidence, because with these affidavits here it is conceded that there are three witnesses who are alive and who, if they were here, would testify to the things in the affidavits. Is the court not almost bound to believe that testimony? The court did not hear them, and the court cannot observe their demeanor or their conduct, nor put them to any tests as to their reliability and credibility, but I presume they were reasonably well set up business men who would testify in a reasonably orderly way. It

and the activities should be carried on in a way which would result in the elimination of the activities.

[illegible]

would really be a completely new life. It
 thing - one would really well get up
 about reliability and conviction, but I believe
 them, as the great ones of the world are
 in the attitude. In the world now I feel alone
 it they were more, and I feel alone
 there are three attitudes which I believe are
 also these attitudes have been in the world
 individual is a single one, and I believe
 that now. I believe that the world is
 where the three attitudes are. I believe
 points in a single attitude. I believe
 would be good to have, but I believe
 every one of us has in the world. It is the only
 one do not believe the world. It is the only

seems to me that the only thing in this case is whether or not there was a contract. If there was such a contract - in fact it is a defense - it seems to me that it is not unusual and yet not altogether so - it is not inconceivable that men entered into that kind of a contract in order to get the goods on the market. Is that inconsistent - that such a contract could not be made? Suppose he had agreed to ship his goods here, and he was to pay for what he sold, and return what he did not sell, but if he did sell them he was to receive a certain discount; if he did not sell them there is no question about the discount being considered. I cannot see how the plaintiff can recover. Here is the man himself, the agent - I did not let that go in - what the agent had told him - that is improper, and that ought not to be admitted, but the affidavit is proper. Here is the defendant himself who testifies along similar lines, and then there are the other two witnesses who say that they were there and heard the principal ratify it. There were four witnesses who say that.

Mr. Brown: The principal himself does not say it.

The Court: Yes, he said that he heard him say: 'Yes, you have a contract with me.' Four men here say it. He says: "Made and entered into a certain oral contract with the firm of Weiss, Siegel & Schwartz." The sale is accompanied by certain terms.

Mr. Sutton: Counsel admits that if the witnesses were here they would testify to those facts.

The Court: You are asking me, Mr. Brown, to say that one witness, the plaintiff, is telling the truth, and four witnesses for the defendant are not. If they are telling the truth there is no question here. What right have I to absolutely disregard the testimony of three witnesses without even having the opportunity to observe and make up my mind that they are not telling the court the truth? I must assume they are.

Mr. Brown: Will your Honor just pardon me. I am sorry that your Honor feels that way. I would like to move for a non-suit.

The Court: All right.

Mr. Sutton: I object to that. It has now been submitted to the court for a decision.

The Court: I have not decided it. I argued with counsel about it. I will permit him to take a non-suit, particularly under these circumstances. I do not believe in non-suits myself. I do not know whether they will bring suit or not, but if he does I do not think he will have any trouble in taking the deposition of witnesses.

Mr. Sutton: The court has been very lenient with counsel in allowing this case to be heard on the short cause calendar when he knew that he could not read the exhibits in that time. We come in here and try the case a whole day, and then submit it to the court for a decision, and under the statute the court has no right to allow a non-suit.

The Court: I think I will permit him to take a non-suit. It was decided altogether on the affidavits.

Mr. Sutton: I desire to preserve an exception."

On February 20, 1915, the trial judge allowed the plaintiffs' motion for a non-suit and entered judgment for costs in favor of the defendant. It is to reverse that judgment that this writ of error was sued out and the cause removed to this court.

As to the motion for a non-suit; It is obvious from the language of the trial judge that the plaintiff did not move for a non-suit, until he had been informed by the trial judge that he did not see what he could do but allow the motion of the defendant for a finding in his favor. Before the plaintiff made his motion for a non-suit the trial judge discussed somewhat elaborately the evidence and among other things said, "I do not see how the plaintiff can recover". When the counsel for the plaintiff said, "I am sorry your Honor feels that way. I would like to move for a non-suit", he admitted that he had been informed of the conclusion which the court had reached. Yudelson vs. Winterberg, 185 Ill. App. 454.

As to the merits of the case: Pursuant to section 23 of the Municipal Court Act, it is the duty of this court to decide this case upon its merits as they may appear from the statement or stenographic report which is signed by the trial judge. In the brief of the plaintiffs' (defendants in error) it is stated that they are "desirous to submit to this court the whole case involved"; and, likewise, the brief of the defendant (plaintiff in error) requests that the whole matter may be here determined upon its merits. The evidence in the case is conflicting. The testimony on behalf of the plaintiffs is contradicted by the evidence of the defendant. The trial judge, in his statement at the close of all the evidence, gave a

On February 22, 1915, the trial judge allowed the plaintiff's motion for a non-suit and entered judgment for the defendant. It is to be noted that the judge went that this bill of costs was such and was removed to this court.

As to the motion for a non-suit, it is obvious from the language of the trial judge that the plaintiff did not move for a non-suit, until he had been informed by the trial judge that he did not see what he could do but allow the motion of the defendant for a finding in his favor. Before the plaintiff made his motion for a non-suit the trial judge discussed minutely the evidence and among other things said, "I do not see how the plaintiff can recover." When the counsel for the plaintiff said, "I am sorry your honor feels that way, I would like to move for a non-suit," he admitted that he had been informed of the conclusion which the trial judge had reached. Winterberg, 185 Ill. App. 108.

As to the motion of the court, judgment to section 83 of the Criminal Code, it is to be noted that this court to decide this case upon the motion of the plaintiff and the evidence of the defendant. It is signed by the trial judge. In the event of the plaintiff's (defendants in error) it is stated that they are "advised to submit to this court the whole case involved; and likewise, the trial of the defendant (defendants in error) requests that the whole case be referred to the court. The evidence in the case is as follows: The testimony on behalf of the plaintiff is contradictory by the evidence of the defendant. The trial judge, in his statement of the facts of the case, says:

resume and made an analysis of the effect of the evidence, and concluded that the testimony for the defendant was true and established the contract as contended for by him. On the face of the record, we are of the opinion, that the plaintiffs completely failed to make out their alleged case. The plaintiffs have failed, to use the language of the court in Siegmund v. Strackbein, 140 Ill. App. 454, "to comply with the elementary principle of law, which compels the party having the affirmative to maintain and establish it by a preponderance of the evidence."

Inasmuch, therefore, as the granting of the motion for a non-suit was improper and as the evidence fails to prove the claim of the plaintiffs, the judgment is reversed, with a finding in this court in favor of the defendant, (plaintiff in error) and for all his costs.

REVERSED AND JUDGMENT.

and concluded that the testimony of the two witnesses was not
and established the contract as evidenced by him. The
the face of the record, we are of the opinion that the
plaintiffs completely fail to show that the defendant
case. The plaintiffs have failed to show that the
of the court in Illinois v. Board of Directors, 100 Ill. App. 2d
"to comply with the elementary principles of law, and
compels the party invoking the writ to maintain the
established by a preponderance of the evidence."

[illegible]

WILLIAM H. HERHOLD,
Appellant.

vs.

FREDERICK H. HERHOLD and
HERHOLD CHAIR CO., a corp.,
Appellees.

203 I.A. 272

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE RESURELY
DELIVERED THE OPINION OF THE COURT.

By his bill (a second amended bill) complainant charged the misappropriation of funds of the Herhold Chair Company by the defendant Frederick H. Herhold, and prayed that he account for same and make restitution and that a receiver of the company be appointed. Answer was filed by defendants, and replication by complainant. Upon hearing, after complainant had introduced his evidence, the court of its own motion ordered the bill dismissed for want of equity. From this order complainant has appealed.

We are of the opinion that the chancellor properly held that the evidence adduced failed to support the allegations of the bill, and that no sufficient ground for the appointment of a receiver was shown.

The defendant Herhold Chair Company manufactured chairs. The business was carried on as a copartnership prior to March, 1907, at which time it was incorporated. The copartnership was known as F. Herhold and Son. The father of the complainant and of the defendant Frederick, who owned the large part of the stock, died in January, 1908, and ten days thereafter his widow died, leaving as heirs the complainant, William, the defendant Frederick, and five other children. The stock of the corporation was divided so that

SALES

ALLAN H. H. WALLING
JAMES L. J.

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Journal of Management Studies, 19(1), 67-80.

Special Agent in Charge, New York

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REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

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and ten days, a week or less at a time, for the purpose of

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now the complainant holds 310 shares, Frederick and his wife 310 shares, and each of the other children 60 shares, with the exception of Edward who owns 140 shares.

In February, 1909, a division of other property in the estate was attempted. All of the children except the complainant, William, were willing that the children living in the family homestead should have it as their share, and deeds to this end were executed, but William refused to assent to this. This naturally resulted in a feeling of antagonism on the part of the other children towards him, and apparently strong anger on the part of the girls who were living in the homestead. This feeling was expressed towards him by statements indicating that they were six to one against him in the management of the business, and a statement from Frederick, as complainant claims, that William should get nothing out of the business. In June of that year, at the directors' meeting, the complainant was not elected to the position of secretary of the company which he had theretofore held, and his employment as superintendent was also terminated.

Frederick
The defendant was elected president and treasurer.

In support of the allegations of the bill concerning misappropriation of funds by the defendant Frederick Herhold, only two specific acts were suggested, one with respect to certain transactions of the Herhold Chair Company with Greenfield Manufacturing Company, a lumber corporation, and the other with respect to certain transactions with the Anaconda Gold Mining Company. We do not think it necessary to narrate these transactions in detail. It is not seriously contended that it was proven ^{that} in either of these transactions the defendant Frederick Herhold misappropriated funds of the

company. Indeed, counsel for complainant in his brief concedes that with reference to the Greenfield Manufacturing Company no improper conduct of the defendant was shown. This might also be said of the transaction with the Anaconda Company.

The fundamental basis of complainant's claim is the showing of a hostile disposition towards him on the part of the officers and directors of the Chair Company.

We think it is too well established for further discussion that before the court should appoint a receiver it must clearly appear that such appointment is an imperative necessity to preserve the property of the company. So long as the concern is a prosperous, going concern there is no necessity for a receiver. As is well said in Vienna Bakery Co. v. Heisler, 50 Ill. App. 406, -

"Courts do not appoint receivers as a punishment for past dereliction, nor because of past dangers. Receivers are appointed because of present conditions and well founded apprehensions as to the future."

It might also be added that such apprehensions as to the future must be founded upon facts clearly proven by evidence, and cannot rest merely upon hostile expressions, especially such as naturally arise out of a family quarrel. Complainant has done no more than prove a disposition on the part of the officers of the company antagonistic to him, but no facts showing that as a stockholder he has suffered loss by reason of this antagonism. This antagonism might go so far, as it did, ^{as} to deprive him of a position of employment with the company, but such action was within the powers of the directors representing a majority of the stock, and while this indicates hostility to him personally it is not proof that the business of the corporation will be so handled as to endanger his interests as a stockholder. Among the many cases

company. Indeed, counsel for complainant in this action con-
cedes that with respect to the Greenfield manufacturing
company no lighter conduct of the defendant was shown. This
might also be said of the transaction with the defendant com-
pany.

The fundamental basis of complainant's claim is
the showing of a hostile relationship between it and the
of the officers and directors of the defendant company.
It is said that it is not well established for further
disposition that before the court should require a showing of
must clearly appear that such relationship as an independent
necessity to preserve the interests of the company. It is
as the company is a corporation, a long business career is
necessity for a receiver. He is well and in virtue clearly
Ge. v. Reister, 111. 401. 402.

"Counsel for the defendant company in this action
for past conduct of the defendant company. The
necessity for a receiver is not a condition of
well founded principle in the law."
It might also be said that such a relationship as to the
this must be found upon facts clearly shown by the
and cannot rest upon a mere possibility of a relationship
then an independent showing of a hostile relationship is
has been no more than a mere possibility of a relationship
officers of the company notwithstanding to the fact that
who in the past conduct of the defendant company is shown
of his conduct. It is a fact that the defendant company
as a receiver is not a condition of a hostile relationship
company, but such a relationship is not a condition of a
long relationship and a relationship of the defendant company
indicates hostility to him personally as well as to the
the business of the corporation will be handled as to the
under his interest as a stockholder. Among the employees

supporting the rule that courts will proceed with extreme caution in the appointment of receivers, and will do so only upon a clear showing of necessity for preserving property, are Elcin v. Independent Brewing Assn., 231 Ill. 394; Leople v. Weigley, 155 Ill. 491; First National Bank v. Gage, 79 Ill. 207, and Scotfield v. Marinette Saw Mill Co., 153 Ill. App. 469.

Something has been said concerning a denial to complainant of access to the books, but we find no evidence to support this assertion, but rather the evidence shows that since the bill was filed complainant was given, and availed himself of, a full opportunity to examine the books.

Complaint is made of the action of the chancellor in refusing to admit in evidence the opinion of the Appellate Court in a certain other case in which Frederick Herhold was a party. It is said that this opinion would indicate improper conduct on the part of Frederick Herhold in another matter, and that this would tend to show such a habit on his part. This contention is not sound, and the court properly excluded the evidence.

There was no error by the court in its rulings upon the admissibility of evidence, and under the facts before us its judgment that the complainant was not entitled to the relief sought was correct.

The judgment is affirmed.

APPROVED.

GEORGE J. WILLIAMS,
Appellant,
vs.
J. C. VREEDER,
Appellee.

203 T.A. 274
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURNLY
DELIVERED THE OPINION OF THE COURT.

This is a suit for unpaid rent of an apartment on a lease at \$37.50 per month, for the month of May and the first half of June, 1914.

One aspect of this case has heretofore been considered in this court. See 195 Ill. App., page 413. We there held that under the terms of the lease the defendant was obligated for rent until April 30, 1915. It appears that the defendant vacated the premises on May 1, 1914, and that plaintiff re-rented the premises after a loss of 1½ months rent, amounting to \$56.25. The defense made upon the second trial, which is the one now under review, was that by mutual agreement of the parties the lease was surrendered and terminated on April 30, 1914. Upon trial it was held that this defense was established, and judgment against the plaintiff was entered.

We hold that this judgment must be reversed for the reason that the defense of surrender by agreement was not proven. At most it was shown that there were negotiations between the defendant and a Mr. Davidson, who undertook to act for the plaintiff. These verbal negotiations went to the extent of drawing a lease of another apartment, which was signed by the defendant and given to Davidson, and

U.S. A. 1908
ALFRED HENRY HENDRICKSON
OF CHICAGO

EDWARD J. HENRICKSON
Appellant
vs.
J. C. VERDEN
Appellee

THE HONORABLE JUDGE OF THE DISTRICT COURT
OF CHICAGO

This is a bill for specific performance of a contract to lease at \$47.50 per month, for the month of May and the first half of June, 1914.

The report of this case was made before the court on this case. The court has considered the evidence and the facts of the case and has found that the defendant has failed to perform his contract. The court has also found that the plaintiff is entitled to the specific performance of the contract. The court has therefore granted the plaintiff's bill for specific performance of the contract.

It is the duty of the court to enforce the contract. The court has found that the defendant has failed to perform his contract. The court has therefore granted the plaintiff's bill for specific performance of the contract. The court has also found that the plaintiff is entitled to the specific performance of the contract.

such leases were placed upon the desk of the plaintiff. This was in March, 1914, and it is not denied that at this time defendant was notified by letter that the negotiations for the new lease would not be consummated until the apartment then occupied by the defendant had been rented, and that the defendant would be held answerable for the rent of the apartment until such time as a new tenant would be secured. The evidence shows without denial that the new tenant was not secured until the middle of April; hence, under his contract of lease and the evidence defendant was liable for the rent for the period between May 1, 1914, and the time of the new leasing.

At the conclusion of the hearing of evidence upon the trial below the plaintiff moved the court to direct the jury to return a verdict in favor of the plaintiff and against the defendant in the sum of \$56.25. Under the evidence this motion should have been allowed, and its denial by the trial court was error.

The judgment of the lower court will be reversed, and judgment for this amount, \$56.25, in favor of the plaintiff, appellant here, and against the defendant, appellee here, will be entered in this court.

REVERSED AND JUDGMENT ENTERED.

GEORGE E. FORD,
Plaintiff in Error,

vs.

AMERICAN EXPRESS COMPANY and
ILLINOIS CENTRAL RAILROAD CO.,
Defendants in Error.

203 I.A. 275

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for alleged failure on the part of defendants to deliver a shipment of strawberries. On trial by the court a finding was made favorable to the defendants and judgment was entered on the finding.

Plaintiff's action was in contract, of the 4th class in the Municipal Court. By his statement of claim he alleged that he delivered to the defendants as common carriers a carload of strawberries at Independence, Louisiana, for carriage from that point to Chicago; that they received the shipment and promised safely to convey the same; that thereafter the defendants attempted to make delivery to plaintiff, but so carelessly and negligently conducted themselves in that behalf that the consignment became wholly lost to the plaintiff; that defendants while making delivery of the consignment in Chicago negligently moved the car from Chicago to Champaign, Illinois, as a result whereof the plaintiff became damaged.

The evidence tends to show that plaintiff delivered the consignment in question to the American Express Company as a common carrier, at the usual express rates, and the company issued its receipt for the shipment; arrangements for the movement were all with the agent of the express company. No bill of lading was issued by the railroad company, nor is it shown that the railroad

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DATE 08-01-2001 BY 60322 UCBAW

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made favorable to the defendant and judgment was entered on the finding.

[illegible]

The above was taken from the report of the railroad
the commission in a letter to the railroad. The railroad
common carrier, as the railroad charged, it was not a
its receipt for the shipment; and the railroad was
all with the report of the railroad. The railroad was
received by the railroad a receipt, or it is a receipt for the railroad

company had anything to do with the shipment except that the express company used a car which was designated as "I. C. 4591." A delivery was made by the express company in Chicago at the same place where the railroad company also makes deliveries. The car arrived in Chicago on the morning of April 22, 1914, at 8:43, which is conceded to have been a reasonable time for the transportation. It was placed for unloading on the team track of the Illinois Central Railroad Company near Randolph street. The car was then tendered by the express company to an agent for the plaintiff; it was opened and the contents examined by him and found to be in good condition. Plaintiff's agent then signed a receipt for the same, and on the same day the express charges were paid by plaintiff to the express company. Plaintiff allowed the car to remain at that point the entire day of April 22nd, and made no effort to unload it. Next morning the same agent of the plaintiff could not find the car where he had left it the day before. Adopting the language of plaintiff's counsel, it seems "that the car got mixed up with some empties and was hauled to Champaign, Illinois, where the mistake was discovered and it was immediately brought back to Chicago." It does not appear who, if any one, indicated that the car was ready for movement out of Chicago, and it is also conceded that this movement from Chicago to Champaign was no part of the carriage. The car was again placed on the Illinois Central team track upon its return at 1:30 p. m. April 23rd. Plaintiff did not take the berries from the car that day but waited until the following morning, when a portion of the berries were removed; the balance were allowed to remain in the car until April 25th. There was evidence tending to show that by this time they were in a moldy condition.

company and station in the ...
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 4501." A delivery ...
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It is a sufficient answer for the railroad company to say that the shipment in question never came into its possession. The facts, as above stated, show that the delivery was to the express company. There can be no recovery for failure to perform a contract to deliver goods if no goods were actually received by the carrier.

It has been held that railroad companies are not common carriers of the traffic of express companies. Memphis & Little Rock R. R. Co. v. Southern Express Co., 117 U. S. 1. This case holds that railroads, in the furnishing of facilities to express companies for the transportation of their traffic, are not common carriers but act only as private agents under such agreements as they may make with the express companies; that with reference to carrying express shipments the duty owed to the public is by the express companies as common carriers and not by the railroads.

The defense of the express company is entirely sound. The evidence clearly shows a delivery of the consignment to the plaintiff. The misadventure of having the car removed was through no fault of the express company; its contractual relations with plaintiff were at an end upon the delivery to plaintiff of the consignment and the payment of express charges. The goods were delivered to plaintiff within a reasonable time, examined by him and found to be in good condition. His failure promptly to unload the car not only made possible the accident of having it moved as an empty car, but also contributed to the deterioration of the shipment itself.

The judgment of the trial court was right and is affirmed.

AFFIRMED.

It is a sufficient answer for the railroad com-
pany to say that the goods are in its possession, and that it is
not responsible for the loss, as above stated, and that the liability
rests to the express company. There can be no recovery for
failure to perform a contract to deliver goods if no goods
were actually received by the carrier.
It has been held that railroad companies are
not common carriers of the traffic of express companies.
Knapp & Little v. N. Y. & N. H. R. Co.
117 U. S. 1. This case holds that railroad companies are not
liable for the loss of goods consigned to them for transpor-
tation of their traffic, but are liable only for the loss of
goods consigned to them for transportation as express
only as private agents under their contracts as such.
Goods with the express consigned; as is the case to
carrying express shipments are held over to the liability
by the express companies as carriers, and not by the
railroads.
The liability of the railroad company is primary
sound. The express company is a liability of the rail-
road company to the public. The liability of the railroad company
removed the liability of the express company; the
contractual liability of the railroad company is not
the delivery of goods to the express company, but the
of express goods to the public, and the liability of the
within a reasonable time, and the liability of the railroad
in good condition. The liability of the railroad company
not only a liability of the railroad company to the public, but
express only, and the liability of the railroad company is
the liability of the railroad company.
The liability of the railroad company is primary.
is affirmed.

HEINRICH WALDES, SIEGMUND WALDES,
IGNATE PUC and EDWARD MUEZZINGER,
a co-partnership, trading as
Waldes & Company,

Appellants,

vs.

W. R. HANES,

Appellee.

203 I.A. 276

Appeal from

County Court,

Cook County.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover for a large number of buttons or fasteners sold by them to defendant, who replied that he had bought them under a warranty of fitness for a special purpose but they afterwards proved unfit, imposing loss upon him for which he claimed damages as a set-off. Upon trial by a jury defendant had a verdict against the plaintiffs on his set-off for \$275 upon which judgment was entered, from which plaintiffs have appealed.

It is established by virtually undisputed evidence that defendant, a merchant tailor, was intending to manufacture and place on the market a garment called a pants protector, something like overalls, with the legs on the inner side fastened with buttons or fasteners like the ordinary glove fastener, consisting of a metal cap fitting over a metal post; that a Mr. Leber, an agent of plaintiffs, knew of this and approached the defendant with a view to selling him the fasteners; that defendant told the agent that the garment was to be used by persons while cleaning or working with automobiles, which would soil it and make it necessary that the garment should be laundered,

2081A. 276

HEINRICH WALT
IGNAT. POC
a co-partner, trading as
Weiden & Schmidt

Address from

Philadelphia

1917

W. R. WALKER

Philadelphia

RECEIVED BY THE COMMISSION ON THE 10th

plaintiffs' names were to be received for a large
number of buttons or fasteners sold by them to various
who replied that he had bought them but was unable to
find them for a special purpose but they had been proved
unit, imposing loss on the fact that it was a
as a set-off. On the fact that the unit was a
against the plaintiff on the fact that the unit was a
unit was a set-off, from which it is to be seen that
it is to be seen that the unit was a set-off
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to be seen that the unit was a set-off, from which it is
to be seen that the unit was a set-off, from which it is
on the fact that the unit was a set-off, from which it is
the original fact that the unit was a set-off, from which it is
fitted over a metal bolt; as a set-off, from which it is
plaintiffs, many of whom were not present at the trial
a view to settling the fact that the unit was a set-off
the fact that the unit was a set-off, from which it is
clearing or working with a combination, which would be
and make it necessary that the garment should be furnished

and that therefore the fasteners must be of such a kind as would stand up in the process of going through a laundry. It is clear that the parties understood this to have reference to the possibility of the caps, and especially the metal posts, being flattened or pressed out of shape by the laundry mangle and roller through which the garments would pass in the process of laundering. Any other meaning to the expression "stand up in the laundry" would be senseless. The agent was not certain as to the fitness of the fasteners for such purpose, and told the defendant that he would submit this to his principals. He reported to the general manager of plaintiffs, and subsequently informed the defendant that the general manager had said that the fasteners would "stand up" in the laundry as desired by the defendant. Although the agent showed defendant a card containing sample fasteners, yet the kind of fastener desired and ordered by defendant was of a special kind and not like any one of the samples, and was to be made with reference to his special needs and purposes in connection with the garments to which they were to be attached. These fasteners were made up in accordance with the order and attached to the garments which defendant sold to customers. Soon thereafter he commenced to receive complaints that the fasteners would not stand up when laundered but that the posts would be flattened or mashed. The proof that they failed to meet the warranty as to stability when laundered is ample and unquestionable.

These facts establish a simple case of an express warranty that an article to be manufactured for a particular and special use would be fit for that use; it is an undertaking by the seller collateral to the contract of sale. Sales of instruments and machinery by manufacturers are

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generally accompanied by a warranty of fitness for the purposes for which they are intended - and this transaction is of that class. It follows, therefore, that upon the failure of the warranty defendant was entitled to recover damages, if any, upon his claim of set-off.

We are in accord with most of the criticisms directed by counsel for plaintiffs against the instructions given to the jury; they do not correctly state the law and are calculated to confuse and mislead. In a close case on the facts they would be sufficiently prejudicial to compel a reversal, but under the undisputed evidence in this case the jury returned the only verdict it could properly return. We shall therefore not reverse on account of the erroneous instructions.

No instruction as to measure of damages was given, but this cannot be complained of as the court was not requested by either of the parties to give such an instruction. We think, however, that there was sufficient evidence to warrant the jury in finding that defendant incurred damages for even a larger amount than was fixed by the verdict. The difference between what the defendant was obliged to pay for fasteners that answered the purpose, and the price agreed upon to be paid to plaintiffs was something over \$900. This would have been an element of damage proper for recovery, as the law is that the defendant was entitled to the benefit of his bargain. 2 Mechem on Sales, sec. 1317. Another element of damage shown by the evidence was that defendant by the use of the unfit fasteners was worthless a considerable number of the pants protectors left in his shop, with resulting damage of something over \$500. Other elements are the payment by defendant of freight and duty upon the fasteners. We do not think plaintiffs can complain, as

the verdict of \$275 is considerably less than might have been awarded under the evidence.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

the verdict of 1937 is considerably less than right have
been awarded under the will.

For the reasons above stated the judgment

is affirmed.

APPEAL.

CITY OF CHICAGO,
Defendant in Error,

vs.

EMMA SIMONETTI,
Plaintiff in Error.

203 T.A. 279

ERROR TO MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Defendant was arrested and charged with keeping and maintaining a disorderly house in violation of an ordinance of the City of Chicago. Upon trial she was found guilty by a jury and fined \$100. By this writ of error it is sought to have this judgment reversed.

It is first asserted that the trial judge improperly refused a petition for change of venue. It appears from the record that the defendant was arrested by warrant on March 24, 1915, and on the same day moved the court for postponement of the trial. The case was called for trial on April 19th and continued until April 20th, on which date the trial was postponed to April 21st. On the latter date, the parties appearing in court, the defendant moved for a change of venue, which motion was overruled. Afterwards the cause came on for trial and a portion of the evidence was heard by the jury; further hearing was postponed until April 22nd, when the defendant moved the court to quash the complaint, which was overruled; the parties then went to trial which was continued until verdict was rendered.

As to the ruling of the court upon petition for change of venue plaintiff says that the action of the court is not properly preserved for our review. Section 23 of the Municipal Court Act, with reference to cases of this kind provides that parties desiring to preserve matters of this

2081A 279

ARROW IN ORIGINAL COPY

173 - 28800

CITY OF CHICAGO,
Defendant in Error.

vs.

WILLIAM ALBERT,
Plaintiff in Error.

RE. INCLUDING JUSTICE MEMORANDUM

DELIVERED THE WRITING BY THE COURT.

Defendant was arrested and charged with keeping and maintaining a disorderly house in violation of an ordinance of the City of Chicago. Upon trial she was found guilty by a jury and fined \$100. By this writ of error it is sought to have this judgment reversed.

It is first asserted that the trial judge improperly refused a petition for change of venue. It appears from the record that the defendant was arrested by warrant on March 24, 1915, and on the same day moved the court for postponement of the trial. The case was called for trial on April 19th and continued until April 23rd, on which date the trial was postponed to April 24th. On the latter date the parties appearing in court, the defendant moved for a change of venue, which motion was overruled. Thereafter the case came on for trial and a portion of the evidence was heard by the jury. The case was postponed until April 25th, when the defendant moved the court to quash the complaint, which she overruled; the parties then went to trial which was continued until April 26th (Wednesday).

As to the ruling of the court upon petition for change of venue similarly says that the action of the court is not properly preserved for our review. Section 10 of the Municipal Court Act, with reference to cases of this kind provides that parties desiring to preserve matters of this

sort for review shall do so by making "a correct statement of such other proceedings in the case as such party may desire to have reviewed." We think this is sound. The statute has not been followed. What is said to be a bill of exceptions was presented to the court and signed by it, but we find nothing in section 23, supra, providing for a bill of exceptions in such a matter as this.

Furthermore, the case was pending before the same trial judge from March 23rd until April 21st, when the motion for change of venue was made; upon its refusal defendant went to trial and her attorney examined jurors and witnesses and in every way participated in the trial. It has been held in Keyes v. Kern, 94 Ill. 531, under similar circumstances, that "it would be vicious practice to permit a party, under such circumstances, to proceed to trial, try the experiment whether he could succeed, and if he failed, then to fall back on the refusal to grant a change of venue, and claim a reversal." And in Theobald v. C. M. & St. E. Ry. Co., 75 Ill. App. 208, this court held, under the authority of the Keyes case, that this participation in the trial was a waiver of any alleged error of the trial judge in previously overruling the application for a change of venue.

It might also be said that the affidavit for change of venue was sworn to before the attorney in the case. It has been frequently held that such affidavits will not be received or considered. Taylor v. Hatch, 12 Johns. 340; Willard v. Judd, 15 Johns. 531; Hallenback v. Whitaker, 17 Johns. 2; Vary v. Godfrey, 6 Cow. 557; Len v. Geiger, 91 J. Law (4 Halstead). 225; Ropkinson v. Luckley, 8 Taunt. 74. "By the general practice of all the courts affidavits sworn before the attorney or solicitor in the cause cannot be read." Tidd's Practice, 494; Dan. Chy. Prac. 234.

nothing in section 15, above, prevailing for a bill of exchange -
titions was presented to the court and signed by it, and we find
has not been followed. What is said to be a bill of exchange -
also to have reviewed." In which bill is signed, and because
of such other proceedings in the case as such with any of -
sort for review shall be so by making "a correct statement"

[illegible][illegible]

We must assume the sufficiency of the evidence to support the charges made, for the reason that there has not been preserved for our review the ordinance which defendant is charged with having violated. We have repeatedly held that in the absence of the ordinance, of which we cannot take judicial notice, we must presume the correctness of the finding of the trial court. City v. Tearney, 187 Ill. App. 441; City v. Baker, 157 id. 130; City v. Moran, 192 id. 57; City v. Kohn, 195 id. 399.

Something is said about two cases against the defendant having been tried by the same jury at the same time and that the jury were sworn only once, and that the defendant was allowed only five peremptory challenges. This statement is not supported by the record, from which it appears that only one case was tried by the jury. We are bound by the record.

There being no convincing reason for disturbing the judgment it is affirmed.

AFFIRMED.

We must assume the sufficiency of the evidence

to support the charges made, for the reason that there has

not been preserved for our review the ordinance which de-

fendant is charged with having violated. We have repeatedly

held that in the absence of the ordinance, of which we cannot

take judicial notice, we must presume the correctness of the

finding of the trial court. City v. Terrence, 187 Ill. App.

441; City v. Baker, 187 Ill. App. 130; City v. Brown, 188 Ill. App.

City v. Kohn, 189 Ill. App. 307.

Something is said about two cases wherein the

defendant having been tried by the same jury at the same

time and that the jury were sworn only once, and that the

defendant was allowed only five peremptory challenges. This

statement is not supported by the record, from which it ap-

pears that only one case was tried by the jury. We are

bound by the record.

There being no convincing reason for disturbing

the judgment it is affirmed.

ATTORNEY.

CITY OF CHICAGO,
Defendant in Error,
vs.
GUSSIE BOLLER,
Plaintiff in Error.

203 I.A. 281

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant was arrested and charged with keeping a place in Chicago where liquor was sold in less quantities than one gallon, without a license, in violation of an ordinance of the City of Chicago, and upon trial by a jury she was found guilty and fined \$50.

The defendant, by the same counsel appearing in case No. 22600, in which an opinion is this day filed, asserts error by the trial judge in denying a petition for change of venue, and makes substantially the same points upon the record as were made in that case. What we said in the opinion in No. 22600 with reference to the ruling on the application for change of venue is applicable to the instant case. The matter is not properly preserved for our review by a correct statement as prescribed by the statute, and the affidavit was sworn to before the attorney in the cause.

Neither is the ordinance before us for review, and in its absence we will assume the sufficiency of the evidence. See cases cited in No. 22600, supra.

203 AL 281

State of New York
County of New York

CITY OF NEW YORK
IN SENATE
JANUARY 1, 1914
REPORT OF THE
COMMISSIONERS OF THE
LAND OFFICE

THE LAND OFFICE

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE

FOR THE YEAR ENDING DECEMBER 31, 1913

THE LAND OFFICE OF THE CITY OF NEW YORK, under the direction of the COMMISSIONERS OF THE LAND OFFICE, has the honor to submit herewith its report for the year ending December 31, 1913. The report contains a statement of the work done during the year, and a statement of the financial condition of the office at the close of the year.

The report is divided into two parts. The first part contains a statement of the work done during the year, and the second part contains a statement of the financial condition of the office at the close of the year. The work done during the year was of a routine character, and consisted of the receipt and disbursement of money, and the management of the office. The financial condition of the office at the close of the year was satisfactory, and the office was able to meet its obligations.

Respectfully,
COMMISSIONERS OF THE LAND OFFICE

and in the absence of all other persons, the undersigned, as acting COMMISSIONERS OF THE LAND OFFICE, do hereby certify that the foregoing is a true and correct copy of the report of the COMMISSIONERS OF THE LAND OFFICE for the year ending December 31, 1913.

In this case, also, the statutory record does not disclose that two cases against the defendant were tried at the same time.

The judgment is affirmed.

AFFIRMED.

in this case, and the record does
not disclose that the person named the defendant was
at the same time.
The defendant is advised.
The defendant is advised.

175 - 22602

CITY OF CHICAGO,
Defendant in Error,

vs.

GUSSIE BOLLER,
Plaintiff in Error.

203 I.A. 282

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant was charged with having kept and maintained a house of ill-fame for the practice of prostitution, in violation of a city ordinance. Upon trial by a jury she was found guilty and fined \$75. She asks that this judgment be reversed, contending that the evidence did not prove the charges.

Plaintiff makes the point that the "correct stenographic report" incorporated in the record should be stricken therefrom for the reason that the time within which it should have been filed as allowed by statute had expired before it was filed. Upon inspection we find this to be true. The statute - section 23 of the Municipal Court Act - provides that a correct stenographic report shall be signed and placed on file at any time within 30 days after the entry of judgment, or within such further time as may "upon application therefor within said 30 days, be allowed by the court." The instant judgment was rendered October 23, 1915; the last day for filing the stenographic report or for applying for further time fell on November 22nd. The record shows that the application for an extension was

U.S. A. 282

CITY OF NEW YORK,
Defendant in error,

vs.

vs.

GUOJIA TOLIER,
Plaintiff in error.

THE COURT OF THE CITY OF NEW YORK,
SAYED THAT THE COURT OF THE CITY OF NEW YORK,

has not yet decided whether or not the
tained a right to the use of the
in violation of a city ordinance, and by a jury the
was found guilty and fined \$100. The city has
be reversed, and the city has not yet
the charges.
This will mean the city has not yet
graphic type" incorporated in the city's
therefore for the city to be held liable
should have been held liable for the
before it was filed. The amount of the
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act - provided that a person who
shall not be held liable for the
the city of New York, or for the
when collection of the city's
by the city. The city has not yet
of 1917, and the city has not yet
or for the city. The city has not yet
The record shows that the city has not yet

made on November 24th, 32 days after the rendition of the judgment, and hence too late. The court did not then have jurisdiction to allow further time.

The stenographic report being stricken, we cannot consider any assignments of error based upon the sufficiency of evidence. No errors arising from the statutory record are presented to us. It follows, therefore, that the judgment should be affirmed.

AFFIRMED.

made on the basis of the evidence presented in the
judgment, and the fact that the evidence has been
judged to be sufficient to sustain the verdict.
The statement of the facts is as follows: The
complaint in this case is that the defendant
of evidence. No facts are stated in the complaint
are presented to the jury. It is stated, however,
judgment should be affirmed.

W. H. H. D.

JOHN and WILLIAM HALLISSEY,
as Hallissey Brothers,
Appellees,

vs.

ROTHSCHILD & COMPANY,
Appellant.

203 I.A. 283

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$225 had by plaintiffs in their suit against the defendant to recover damages to plaintiffs' horse occasioned by the negligent operation of defendant's automobile.

The case was tried by a jury. It was called for trial at a time when the defendant's attorney was engaged elsewhere in the trial of a case. His clerk asked that it be continued, which request was refused. The trial court took occasion at this time to make an address to the jury which it may be conceded was uncalled for and improper. We are asked to hold that these remarks were so prejudicial as to necessitate a reversal. We are not inclined to agree with this contention. They were made by the court in answer to statements by the clerk of defendant's attorney, and as explanatory of the court's action in denying the request for a continuance. We think, further, in view of the fact that the verdict under the evidence is the only one the jury properly could have reached, that the judgment should not be reversed even if the remarks of the court might be construed to be prejudicial. See Collison, Admr., v. I. C. R. R. Co., 146 Ill. App. 64.

888 A.1808

JOHN and WILLIAM HALLIDAY,
as Halliday Brothers,
Appellants,
vs.
NORTHSHORE LUMBER COMPANY,
Appellee.

WILLIAM HALLIDAY, JR.
CHICAGO, ILL.

MR. PRESIDING JUDGE, COURT,
DELIVERED THE VERDICT OF THE COURT.

This is an appeal from a judgment of the court
by plaintiffs in favor of defendant and defendant to recover
damages to plaintiffs' horses occasioned by the negligent
operation of defendant's sawmill.
The case was tried by a jury, and the jury returned
trial at a time when the defendant's witnesses were called,
elsewhere in the trial of a case. It is clear that the
be continued, which request was refused. The trial court
took occasion at this time to make an error in the law,
which it may be considered was made at the time and place,
are asked to hold that these errors were so prejudicial as
to necessitate a reversal. We are not inclined to agree
with this contention. They were made in the course of a
to statements by the clerk of defendant's attorney, and the
explanatory of the court's action in granting the request for
a continuance. We think, further, in view of the fact that
the verdict under the evidence is in favor of the jury, and
only could have resulted, and the judgment should be re-
versed even if the reversal of the verdict is required.
be prejudicial. The judgment is affirmed. 100 Ill. App. 179.

From the evidence the jury could properly find that the driver of plaintiffs' horse was driving east on Madison street in Chicago; that when he was about to turn south in Homan avenue, a cross street, he looked behind and saw an automobile coming a quarter of a block away; that the automobile was being driven at a rate of from 18 to 20 miles an hour, and that it attempted to pass the horse drawn vehicle on its south side, that is, to the right, just as the horses were turning into Homan avenue; that it struck the horse's front feet, and went 200 feet before it could be stopped.

Under such circumstances it was properly a question of fact for the jury to determine whether or not the accident was caused by the sole negligence of the defendant; and we are unable after consideration to say that its conclusion was not warranted upon the evidence.

It is also contended that the damages are excessive. There was evidence tending to show that before the accident the reasonable market value of the horse was \$250, and that by reason of the injury it became lame and unfit for work, and that its value at the time of the trial was about \$50; that it could be used on a farm but could not be used again on the streets. The amount paid for the board of the horse following the injury was \$46. This would justify a verdict of \$225, without any testimony as to the cost of hiring another horse to take the place of the injured animal. We do not see how under the evidence the defendant could avoid being held liable for damages occasioned by the accident.

The judgment is affirmed.

AFFIRMED.

From the evidence, the jury found that

that the driver of the vehicle, named

had been driving in the city; that he was driving to

south in town over a road that was

new an automobile being a product of a

automobile was being driven in a

on the road, and that at the time

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were turning into the road, and

front foot, and that the

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question of fact, and the jury

accident was caused by the

and we are unable to find

caution was not warranted

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would be liable for

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that

203 - 22631

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ABE SHAPIRO and JAKE LA BOM,
Plaintiffs in Error.

203 I.A. 292

ERROR TO CRIMINAL COURT.

COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendants, charged with conspiracy, were tried before a jury which returned a verdict finding them guilty. They have brought the record to this court for review.

From the abstract of record filed on their behalf it does not appear that any judgment was entered by the trial court. The abstract is the pleading of the parties in this court, and must be construed against them.

As it does not appear that there has been a final judgment in this case there is nothing for this court to review. Hence the writ of error must be dismissed, which is accordingly ordered.

WRIT OF ERROR DISMISSED.

203 A. 203

THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RECEIVED BY THE CLERK OF THE COURT
IN THE MATTER OF THE ESTATE OF JAMES
J. JAMES, DECEASED.
JAMES J. JAMES, DECEASED.
JAMES J. JAMES, DECEASED.

IN SENATE, JANUARY 1, 1903.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE.

Reference is made to the report of the
Commissioners of the Land Office, dated
before a jury which returned a verdict in favor of the
State. They have presented the record to this court for review.
From the statement of facts which appears in the
half it does not appear that any judgment was rendered by
the trial court. The statement is that the jury found in
favor of the State, and that the court affirmed the
verdict. As it does not appear that there was any
final judgment in this case, there is no ground for this court
to review. Hence the writ of certiorari is denied, and
is accordingly ordered.

THE COURT OF APPEALS
OF THE STATE OF NEW YORK

ANNA PICO, a minor, by NICALO
ACCOMARDO, next friend,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,
Defendant in Error.

203 I.A. 293

ERROR TO CIRCUIT COURT,
COCK COUNTY.

MR. PRESIDING JUSTICE ROBERTLY
DELIVERED THE OPINION OF THE COURT.

In this case plaintiff sought to recover damages for personal injuries inflicted upon her by a street car belonging to the defendant. Upon trial by jury a verdict was returned, upon which we are informed by the abstract filed by the plaintiff in this court judgment was entered, but the abstract fails to tell us the nature of the verdict or what the judgment was. In many cases under such circumstances we have affirmed the judgment on the ground that the abstract is the pleading of the parties in this court and we cannot pass upon a verdict and judgment which an appellant or plaintiff in error fails properly to present to us. It has also been frequently held that an index to the record is not an abstract of the record.

We have, however, from the nature of this case been led to give consideration to the merits involved. The case of the plaintiff has been presented to us upon the theory that the verdict and judgment were adverse to her claim. We are of the opinion that upon the merits this judgment of nil capiat should be affirmed.

The plaintiff in her declaration had charged the negligent operation of defendant's street car in that it was being driven at a dangerous and high rate of speed; that no

gong was rung, and that the pavement in the street next to the tracks, which it is alleged it was the duty of defendant to keep in repair, was left irregular and uneven, so that plaintiff stumbled upon the pavement and fell with her hand upon the track.

From the evidence the jury could properly find that on the day of the accident Anna Pico, called plaintiff, about five years of age, with other children was going eastward in Locust street in Chicago towards Clark street, which runs north and south, their destination being Washington Square, which is located on the east side of Clark street; that the motorman of the southbound car saw the plaintiff standing at the west curb of Clark street at Locust street; that his car at this time was approaching the crossing at a speed of 10 or 12 miles an hour; that at this time plaintiff made no attempt to cross the street; that when he was within a short distance of plaintiff she suddenly ran from the curb and fell full length in the street alongside of the door at the front end of the car, with her right hand on the rail just in front of the wheels, which ran over the hand, severely injuring it; that as soon as the motorman saw the child leave the curb he put on his brakes and did all he could do to bring the car to a stop; that when he saw her leave the curb he struck his gong and applied the brakes; that when she got within four or five feet of the track she stumbled and fell.

It has been repeatedly held under similar circumstances that the motorman could not be charged with negligence, a very recent case being Trafelat v. Chicago City Ry. Co., Appellate Court No. 22392, opinion filed November 27, 1916.

There is no evidence to support the allegation

of negligence on the part of defendant with reference to the street paving; furthermore, it appears that a photograph of the street pavement at this point was introduced in evidence and considered by the jury, but such photograph has not been incorporated in the bill of exceptions. We must therefore assume the sufficiency of the evidence to justify the jury in finding adversely to plaintiff's claim in respect to the pavement.

Plaintiff's counsel devote a considerable portion of their brief to criticism of instructions given by the court at the request of the defendant and of the refusal of the court to give instructions requested by the plaintiff, but we are not inclined to hold that errors, if any, in this respect are of sufficient importance to warrant a reversal.

Complaint is made of the alleged conduct of one of the jurors. The impropriety with which he was charged ~~was~~ denied unequivocally by him under oath. The matter was first brought to the attention of the court by a verbal statement of one of the attorneys for the plaintiff, and based upon that a request was made that a juror be withdrawn and the case continued. It was not error under such circumstances to deny this motion, and upon examination of affidavits by the parties concerned the court was fully justified in concluding that no such improper conduct as was claimed had taken place.

It occurs to us that this is a proper case to suggest to counsel for the plaintiff in error that a brief following more closely the rules of this court concerning the composition of briefs would be more helpful to the court.

Upon the whole record we see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

in finding adversely affected persons in a group of persons the efficiency of the service is greatly reduced. In the case of the group, the efficiency of the service is greatly reduced. In the case of the group, the efficiency of the service is greatly reduced.

MARY R. BEAMESDERFER,
Defendant in Error,

vs.

ANTON J. CERMAK, Bailiff of the
Municipal Court of Chicago,
Plaintiff in Error.

203 I.A. 294

ERROR TO COUNTY COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant seeks to have reversed a judgment rendered against him by the County Court in an action of replevin.

Prior to March 17, 1915, the defendant, who is Bailiff of the Municipal Court of Chicago, made a levy under an execution issued on a judgment theretofore rendered by the Municipal Court, upon personal property described in the replevin writ thereafter issued. On March 17th the plaintiff, Mary R. Beamesderfer, filed in the office of the Clerk of the County Court an affidavit for replevin, alleging that she was the owner and entitled to the possession of the personal property levied on by the defendant as aforesaid. The writ was thereupon issued, directed to the Sheriff of Cook County, who on the same date replevied the property and delivered the same to the plaintiff and served the writ of replevin upon the defendant.

The replevin writ was made returnable to the next term of court, that is, the April term, the first day of this term of the County Court being April 12, 1915. Defendant entered his appearance in said cause on March 30, 1915. Plaintiff's declaration was filed on May 13, 1915. The first day of the May term of the County Court fell on

2031.A.294

ORDER TO COUNTY COURT

COOK COUNTY

MARY R. BRANDEMBERG,
Defendant in Error.

vs.

ANTON J. GORMAN, Plaintiff of the
Municipal Court of Chicago,
Administratrix in Error.

MR. JAMES H. HARRIS, Clerk of the Court

DOVER, N.H.

By this order of the Court, the defendant is directed to

have returned a judgment rendered against him by the

County Court in an action of replevin.

That on March 10, 1915, the defendant, who is

Plaintiff of the Municipal Court of Chicago, under a levy made

an execution issued on a judgment rendered against him by the

County Court, took possession of the property of the defendant

replevin with the intention of retaining it.

That on March 10, 1915, the defendant, who is

Plaintiff of the Municipal Court of Chicago, under a levy made

an execution issued on a judgment rendered against him by the

County Court, took possession of the property of the defendant

replevin with the intention of retaining it.

That on March 10, 1915, the defendant, who is

Plaintiff of the Municipal Court of Chicago, under a levy made

an execution issued on a judgment rendered against him by the

County Court, took possession of the property of the defendant

replevin with the intention of retaining it.

That on March 10, 1915, the defendant, who is

Plaintiff of the Municipal Court of Chicago, under a levy made

an execution issued on a judgment rendered against him by the

County Court, took possession of the property of the defendant

replevin with the intention of retaining it.

May 10th. Defendant did not plead to the declaration. The cause was called for trial on February 28, 1916, and the defendant, not appearing, was defaulted and judgment entered against him.

This must be reversed for the reason that the cause was not at issue and should not have been called for trial; neither was defendant in default on February 28th, for the reason that the declaration of plaintiff should have been filed ten days prior to the April term of the County Court. Section 32 of the Practice Act provides that the declaration shall be filed ten days before the term of court to which the summons is returnable, and that if it is not so filed ten days before the second term of the court the defendant shall be entitled to a judgment as in the case of non-suit. That fits the situation before us. Plaintiff's declaration was not filed until after the beginning of the second term to which the writ was made returnable.

The judgment is reversed and the cause is remanded with directions to dismiss the replevin suit at plaintiff's costs.

REVERSED AND REMANDED
WITH DIRECTIONS.

May 1938. Defendant did not plead to the indictment. The
cause was called for trial on February 28, 1938, and the de-
fendant, not appearing, was defaulted and judgment entered
against him.

This cause was reversed for the reason that the
cause was not as stated and could not have been called for
trial; neither was defendant in default on February 28th.
For the reason that the indictment on of plaintiff should
have been filed ten days prior to the April term of the
County Court. Section 35 of the Practice Act provides
that the indictment shall be filed ten days before the
term of court to which the accused is returned, and
that if it is not so filed ten days before the second term
of the court the defendant shall be entitled to a judgment
as in the case of non-suit. And this the indictment returns
was. Plaintiff's indictment was not filed until after the
beginning of the second term to which the writ was made re-
turnable.

The judgment is reversed and the cause is re-
manded with directions to dismiss the indictment and to set aside the
plaintiff's verdict.

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,
vs.
JAMES Y. THOMPSON,
Plaintiff in Error.

203 I.A. 296

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant was proceeded against by information that he did unlawfully, wrongfully and unjustly, for his own gain and to prevent the owner again possessing his property, buy, receive and aid in concealing fourteen bags of Lehigh cement to the value of \$7.13, the property of Gustaf A. Johnson, knowing that the cement had been stolen.

Many errors are assigned, but in the conclusion at which we have arrived there must be a new trial, and we shall therefore not discuss the evidence or its probative force.

Trial by jury was waived and the trial Judge, after hearing the testimony, found defendant guilty of the crime charged in the information in manner and form as therein charged, and sentenced the defendant to pay a fine of \$300 and \$6 taxed as costs and to stand committed to jail until fine and costs were paid, etc.

It is assigned for error that the court failed to find the value of the property charged to have been unlawfully received by defendant, and also permitted the state's attorney to amend the information by striking out the name of James H. McQueeny and inserting that of defendant.

5081A.396

IN SENATE
JANUARY 1, 1910

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,
vs.
JAMES H. HARRIS,
Plaintiff in Error.

That he did unlawfully, wrongfully and maliciously, for the

own gain and to prevent the other from possessing his
property, buy, receive and sell in violation of law
of which contract is the value of \$100,000 and the
of Great A. Company, knowing that the same had been
stolen.

any crime as charged, but in the
tion at which he is charged there was no new crime,
and we shall therefore find that the same was used to the
productive force.

trial by jury, as which is the right of the
after hearing the evidence, and the jury of the
crime charged in the indictment, and in the
therein charged, and the same was used to the
of \$100,000 and to prevent the other from possessing his
property, buy, receive and sell in violation of law
of which contract is the value of \$100,000 and the
of Great A. Company, knowing that the same had been
stolen.

Unlike an indictment, an information may be amended, and the amendment in this case was made necessary owing to a clerical error on the part of the person who transcribed the information. It was held in Long v. People, 135 Ill.435, that in matters of amendment an information stands on entirely different grounds from an indictment. The officer by whom the information was presented being always in court, it may, on his application, be amended to any extent which the judge admits to be consistent with the ordinary conduct of judicial business, with the public interest and with private rights. There was no error in allowing the information to be amended.

The next error complained of is more serious and is fatal to this judgment. It is necessary to find the value of the property received in order to fix punishment under the statute, and this is an indispensable requisite. As said by the late Mr. Justice Baker in The People v. Ellison, 185 Ill. 287:

"It is settled in this State by repeated decisions that whenever the measure or kind of punishment depends on the value of the property stolen, the jury, or court when the trial is by the court, must find that value as part of the verdict or finding, and that without such finding the conviction cannot be supported. Highland v. People, 1 Scam. 392; Sawyer v. People, 3 Gil. 53; Hildreth v. People, 32 Ill. 36; Collins v. People, 39 id. 233; Williams v. People, 44 id. 478; Tobin v. People, 104 id. 566; Thompson v. People, 125 id. 256."

For the error indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

190 - 22617

EDWARD MEISEL,
Defendant in Error.

vs.

WILLIAM KALMS,
Plaintiff in Error.

203 I.A. 297

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This action was based upon an architect's certificate for \$350, being the balance due under a building contract between plaintiff, the contractor, and defendant, the owner of the building upon which the work under the contract was done. On a trial before the court judgment was rendered for the amount of the architect's certificate.

There is no dispute as to the amount due or the propriety of the architect's issuing the certificate. It was issued in pursuance of authority vested in the architect by the contract.

The only defense interposed was the contract, which contained this provision:

"If at any time there shall be evidence of any lien or claim for which, if established, the owner of the said premises might be liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify him against such lien or claim."

A deputy clerk of the Circuit Court was sworn, who testified that the records of the clerk's office showed that a claim for a lien for a balance of \$257 was filed July 31, 1915, by one William Koch on the premises owned by defendant and covered by the contract in evidence.

708 A 100

THE NATIONAL COURT

OF CHICAGO

EDWARD M. ...
Defendant in error

WILLIAM ...
Defendant in error

MR. JAMES ...

This action was brought upon the ...
certificate for ... being the ...
ing contract of ... the ...
... the ...
under the ...
judgment was rendered for the ...
certificate.

There is a dispute as to the ...
the property of the ...
it was issued in ...
attached by the ...
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that ...
July 31, 1911, ...
by defendant and covered by the ...

Plaintiff admitted on cross-examination that Koch was a sub-contractor under him. By Sec. 33 of the Mechanic's Lien Act it is provided that a "petition shall be filed or suit commenced to enforce the lien * * within four months after the time that the final payment is due the sub-contractor, laborer or party furnishing material." From such notice of lien it did appear that Koch completed the work under his sub-contract with plaintiff June 22, 1915. This suit was commenced March 22, 1916, long after the expiration of the four month period which Koch had to commence suit to enforce his claim of lien. As defendant made neither proof nor claim that any suit had been commenced by Koch or was pending at the time of the trial, we will assume no suit was in fact pending or had been commenced. Koch lost his lien in failing to commence a suit to enforce it within four months of the time when he completed the work. If defendant desired to avail of the defense of a subsisting lien, for which he or his property was liable, it was incumbent upon him to produce evidence to sustain it. This he failed to do. It was therefore patent that the defense that Koch had some lien as a sub-contractor failed.

Defendant is carpingly critical of the expeditious manner in which the trial Judge disposed of the case and gave judgment. There was certainly no reason for the Judge to hesitate as to the conclusion at which he should arrive. There was no legal defense interposed, and defendant had no other defense ready to produce. Neither did he show any legal reason why, if he had any other proofs, they were not ready to be submitted.

Defendant has failed to show any meritorious defense. The architect's certificate was issued by the architect of defendant under the contract, and there was

plaintiff admitted on cross-examination that Koch was a sub-contractor under him. By Dec. 30 of the preceding year Act it is provided that a "petition shall be filed or writ commenced to enforce the lien" "within four months after the time that the final payment is due the sub-contractor, laborer or party furnishing materials." From such notice of lien it did appear that Koch completed the work under his sub-contract with plaintiff June 10, 1913. This suit was commenced March 22, 1913, long after the expiration of the four month period which Koch was to commence suit to enforce his claim of lien. As defendant made neither proof nor claim that any suit had been commenced by Koch or was pending at the time of the trial, we will assume no suit was in fact pending or had been commenced. Koch lost his lien in failing to commence a suit to enforce it within four months of the time that he completed the work. If defendant desired to avail of the defense of a substituted lien, for which he or his agent or lessee it was incumbent on him to produce evidence to establish. This he failed to do. It was therefore held that the defense that Koch had some lien as a sub-contractor failed. Defendant is emphatically advised of the exceptional manner in which the trial judge disposed of the case and gave judgment. There was certainly no reason for the judge to hesitate as to the conclusion as to who was the owner. There was no last witness introduced, and defendant had no other defense ready to produce. Had he shown any legal reason why, in law and fact, he was not ready to be satisfied. Defendant admitted to some very serious defense. The architect's certificate was taken by the architect of defendant under the contract, and there was

no evidence that defendant was liable to pay any claim to Koch or any other person claiming under the contract between himself and plaintiff. There was no excuse for his withholding the amount due under the architect's certificate, and the judgment of the Municipal Court is affirmed.

AFFIRMED.

no evidence that defendant was liable to pay any claim to Koch or any other person claiming under the contract between himself and plaintiff. There was no money for his withholding the amount due under the contract's certificate, and the judgment of the Municipal Court is affirmed.

APPROVED.

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

ARTHUR MEYERS,

Plaintiff in Error.

203 I.A. 298

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a writ of error sued out to reverse a conviction of defendant for violating sec. 57, a 1, chap. 38, R. S.

The defendant was proceeded against by information, waived a trial by jury, and the cause was tried before the court on a plea of not guilty.

We will not go through the moral muck and slime involved in the facts constituting the offense of which defendant was found guilty by the trial Judge; a due regard for public decency forbids. Suffice it to say that the trial Judge might properly find from the evidence beyond all reasonable doubt that defendant was guilty of the crime alleged against him in the information. Counsel, however, argue that defendant was not found guilty of the crime alleged against him in the information, but of another and different offense. This contention is not, however, sustained by the record. On turning to that document we find this recitation: "the court being fully advised in the premises finds the defendant Arthur Meyers guilty in manner and form as charged in the information herein"; and the sentence of six months in the House of Correction follows.

The objection to the testimony of McDonald, a particeps criminis with defendant, is without avail. He was

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and found the same for the first time in 1950, not

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THE UNIVERSITY OF CHICAGO PRESS

Theodore W. Smith

Public Law 104-191, 104th Congress, 2d Session, October 1996

a competent and material witness and his testimony condemnatory of defendant was proper to be heard as proof.

It is also argued that defendant was not an inmate of the immoral place set out in the information. Without going into the particulars of the situation we will rest content by holding that he was such inmate within the reasoning and decision of this court in People v Rice, general number 22135, not yet reported.

There is no reversible error in this record and the judgment of the Municipal Court is affirmed.

AFFIRMED.

is competent and entitled to make the decision as to whether or not the
story of defendant was proper to be heard as a matter of fact.
It is also proper that defendant should be allowed to
make of the material facts and in the decision. It is
not going into the merits of the decision as to whether or
content by noting that he was not liable in the matter.
ing and decision of this court in People v. [redacted]. General
per 22135, was not reported.

There is no error in the decision of the court.

the judgment of the criminal court is affirmed.

Reversed.

JACOB MEYER, Complainant,
and ANGELO PAOLELLA et al.
Defendants,

Defendants in Error,

vs.

I. LURIA LUMBER CO. et al.,
Plaintiffs in Error.

203 I.A. 300

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

It is neither important nor necessary to state the pleadings or the nature of the actions involved in this record, as the questions before us for review do not involve either. This is a chancery cause and involves questions affecting mechanic's liens.

There are in the record an original bill and two intervening petitions, upon which issues were joined and the cause referred to a master in chancery, who was subsequently appointed as special commissioner. The original reference was made July 1, 1913. On September 24, 1915, the court ordered the special commissioner to file his report by October 6, 1915, and set the cause for hearing on that date. On October 13, 1915, the suit was dismissed at complainant's cost for want of prosecution. On February 14, 1916, intervening petitioners made a motion to set aside the order of dismissal and on the 11th of March thereafter that motion was denied.

Two questions are presented for our determination - First, did the trial court commit reversible error in dismissing the suit? Second, did the court err in denying the motion to vacate the order of dismissal?

We will observe in passing that the original

202 I.A. 200

REPLY TO DISCOVERY
IN COURT

JACOB M. WYNN, Defendant,
vs.
JACOB M. WYNN, Plaintiff.

Defendant in Error.

vs.

JACOB M. WYNN, Plaintiff,
vs.
JACOB M. WYNN, Defendant.

MR. JUSTICE WILLIAM DELANEY, JUDGE OF THE COURT.

It is neither important nor necessary to state the findings or the nature of the actions involved in this record, as the questions before me for review do not involve either. This is a summary case and involves no determination of fact or law.

There are in the record two original bills and two intervening petitions, upon which issues were raised and the cause referred to a master in summary, who was subsequently appointed. A special commission was made July 1, 1915, and the original reference was made July 1, 1915. On November 24, 1915, the court ordered the special commission to file his report by October 4, 1915, and the cause was set for hearing on that date. On October 14, 1915, the court dismissed the complainant's bill for want of due diligence. On February 14, 1916, the court ordered the defendant to set aside the order of dismissal and to cause the original bill to be filed. Thereafter the cause was dismissed.

Two questions are presented for the court's consideration - first, did the trial court commit error in dismissing the bill? second, did the court err in setting aside the order of dismissal? We will observe in passing that the original

complainant finds no fault with any of the proceedings or the present condition of his bill. The intervening petitioners are the only plaintiffs in error.

At the threshold of this inquiry an examination of the record discloses the fact that there is no certificate of evidence in the record. The record is a hotch-potch. It contains notices, motions, affidavits, etc., which have no place in the record, but which, to present matters thus involved to the court for review, should be embodied in a certificate of evidence. We must therefore assume that the court proceeded regularly in ordering the special commissioner to file his report and in setting the case for hearing. We shall presume also that proper notices were given and that the parties were in court at the time the order was entered upon the special commissioner to file his report and the cause was set for hearing. This being so, it was the duty of the parties to be present in court when the cause was called for trial, and in their absence it was proper for the court to enter the order of dismissal for want of prosecution, as it did.

It does appear that the cause had been pending two and a half years, and that the parties had been tardy in prosecuting the suit. It was the duty of the special commissioner to comply with the order of the court and to have had his report in court in accord with that order; and furthermore, it devolved upon the parties to close their proofs within the time limited by the order, or so much earlier as to enable the commissioner to comply with the order to make and file his report. While ordinarily a chancery suit will not be dismissed while the cause is on reference before a master, still, at the time of the dismissal the re-

complaints made to the effect that the present condition of the road is such that it is not safe to travel on it. The only person who has been injured by the condition of the road is a person who was riding on the road when it was in this condition.

The condition of the road is such that it is not safe to travel on it. The only person who has been injured by the condition of the road is a person who was riding on the road when it was in this condition.

The condition of the road is such that it is not safe to travel on it. The only person who has been injured by the condition of the road is a person who was riding on the road when it was in this condition.

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port of the commissioner should have been in court so that the cause might have proceeded to trial on the day it was set for trial. We think the court in Weil v. Mulvaney, 262 Ill. 200, anticipated a cause somewhat in the condition of that of the instant case at the time of the order of dismissal, when it said:

"We are not prepared to hold that the dismissal of a bill in chancery for want of prosecution while the cause is still pending on a reference to a master might not, under certain circumstances, be proper. The failure to prosecute might consist in a failure to proceed under the order of reference to the master or to take any steps in preparation for the final disposition of the cause."

Furthermore, the bill was dismissed at plaintiffs' cost for want of prosecution, and we doubt whether any of the parties other than complainant can invoke a writ of error, as there is no judgment against any of the parties except complainant. Hedges v. Mace, 72 Ill. 474.

There are no errors assigned which are reviewable on the record before us.

The court had no jurisdiction to entertain the motion to vacate the order of dismissal after the lapse of the term at which the order was entered. An order dismissing the bill for want of prosecution is a final order.

The order of the Circuit Court dismissing the bill for want of prosecution is affirmed.

AFFIRMED.

EMELIE MUNDSTOCK,
Appellee,
vs.
HERMAN MUNDSTOCK,
Appellant.

203 I.A. 302

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

A divorce for the adultery of defendant was granted to complainant with alimony and solicitor's fees. Defendant appeals and urges that the divorce decree is contrary to the evidence and the alimony awarded barred by a post nuptial agreement between the parties.

The least said about the adultery of defendant the better for the morals of all concerned. If ever a case of adultery was clearly proven in judicial annals, this is that case. Adultery is often characterized as a dark and secret crime, in the committing of which the parties are seldom surprised. Proof most often rests in acts, conditions and the propinquity of the parties which in themselves raise a well-grounded inference that the adultery charged has been committed. Here, however, defendant made no secret of his adulterous acts. He on several occasions committed the act constituting adultery with an intemperate and otherwise dissolute woman openly in the presence of a man acquaintance. While it is true that defendant denies that he ever committed adultery with this woman, the evidence aside from that of the eye witness abundantly establishes the fact that defendant, his adulterous companion and the witness to the adulterous acts were sleeping side by side in a barn at the several

808 A 1808

THE UNITED STATES OF AMERICA

IN SENATE

APRIL 18, 1908

7.

REPORT OF THE

MR. JAMES H. HARRIS, SECRETARY OF THE COMMISSION

A Division of the Department of the Interior

Presented to the Senate and House of Representatives

at the opening of the 60th Congress, 1st Session

by a joint resolution of the Senate and House of Representatives

passed March 11, 1907

and the report of the Commission

on the subject of the

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times when the witness swears that defendant was guilty of adulterous acts with the woman who on these occasions was his companion and who was, as a matter of fact, living with him in an adulterous relationship under the guise of serving him as his housekeeper. The learned Chancellor who tried the case could not have correctly arrived at any other conclusion than that defendant was proven to be guilty of the adultery charged. Complainant was on the evidence entitled to a decree of divorce for adultery.

The post nuptial contract is no defense against defendant's liability for alimony. This contract is not susceptible of the interpretation claimed - that it was made to bar complainant's right to alimony. At the time the contract was made neither of the parties contemplated a divorce; nor was the contract made in contemplation of divorce proceedings of either against the other. The fact is that the parties owned two pieces of real estate; one of record in the name of complainant and the other held in joint tenancy by both of the parties, as shown of record. The contract recites that differences had arisen between the parties in relation to the ownership of the property, and both being desirous of settling such differences, the pieces of property were conveyed to complainant, she paying defendant \$2500 in money and assuming an encumbrance thereon of \$1400, evidenced by the notes of both parties, which complainant agreed to pay and to hold defendant indemnified from any liability therefor. As a further consideration of the contract, conveyance, the payment of the \$2500, and the assumption of the \$1400 of indebtedness, each released all claim in or to the real or personal property of the other then owned or afterwards to

be acquired by either, and also agreed that the survivor waived and released all claims of dower, homestead rights, widow's award, or other rights or interest in and to the property of which the one first dying should be seized at the time of his or her death. ^{*} There is nothing in this contract which relieved the defendant from the burthen of the duty which the law cast upon him to thereafter maintain and support his wife, which, so long as he lives, the law requires and demands at his hands in accord with his financial ability. While at defendant's death complainant will have no claim to or interest in his estate, this condition does not relieve him from the payment of alimony following a divorce granted for his own fault.

Whether or not it would have been contrary to public policy for the parties to have contracted to waive the liability of the husband for alimony upon a divorce being granted for his misconduct, it is not necessary for us to decide, because neither by the language used in the contract, nor by inference nor interpretation of any such language can it be held that such liability was anticipated or in contemplation by the parties. The court will not by construction or interpretation broaden the terms employed or read any waiver into the contract not fairly deducible from the language appearing in it. As the contract is silent as to any such liability, the law will settle the liability according to the status of the parties at the time the bill was filed. The status of the parties to each other at such time was that of husband and wife. The husband was therefore liable for the reasonable support of his wife, so long as they were husband and wife, in accord with his financial ability and their station in life.

Under Sec. 18, Chap. 40 R. S., it was the duty of the Chancellor on granting a decree of divorce for the fault of defendant, to award alimony as well as solicitor's fees in favor of complainant. Spitler v. Spitler, 108 Ill. 120; Walter v. Walter, 189 Ill. App. 345.

The amount awarded by the decree for alimony and solicitor's fees, when measured by the financial ability of defendant to pay and the necessity of complainant for financial aid in her support, is reasonable and just and conforms to well settled practice in this class of cases in this jurisdiction.

The decree of the Circuit Court does justice between the parties and is therefore affirmed.

AFFIRMED.

Under Sec. 18, Chas. 40 B. c. 1, it was the duty of the
Chancellor on granting a decree of divorce for the fault
of defendant, to award alimony as well as defendant's fees
in favor of complainant. Walter v. Walter, 104 Ill. 180;
Walter v. Walter, 102 Ill. App. 363.

The amount awarded by the decree for alimony
and solicitor's fees, was measured by the financial ability
of defendant to pay and the necessity of complainant for
financial aid in her support, it transpired that defendant
conforms to well established practice in this class of cases
in this jurisdiction.

The record of the circuit court does not show
between the parties and is therefore omitted.
WALTER.

A. L. ST. GEORGE,
Appellant,

vs.

JAMES A. PRINTY,
Appellee.

203 I.A. 304

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago against defendant, claiming false and fraudulent representations in the sale by defendant to her of a violin. The case was submitted for trial without a jury, and the court entered judgment in favor of the defendant. The case is brought here by appeal.

// The evidence in the record tends to prove that the plaintiff is a native of Italy; that she had been in this country but a short time prior to October 11, 1913, when she purchased the violin in question from the defendant, paying him therefor \$150; that at the time of such purchase she was able to speak English but slightly; that she and her husband went to defendant's residence, and that the defendant had represented to them that the violin was very old and was hand-made, that it was worth \$200, and was a good copy of an Amati; that neither she nor her husband knew anything about violins, and that they relied upon the defendant's representations. //

Upon the trial plaintiff's counsel offered to prove by plaintiff's husband that the representations in question were in fact made by defendant. The court refused to permit the husband to testify as to representations made by the defendant in a conversation between the defendant, the

408 A. 1373
 JAMES A. KELLEY, Appellant,
 vs.
 JAMES A. KELLEY, Appellee.
 CHICAGO, ILL. COURT

MR. JUSTICE DENNIS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago against defendant, claiming false and fraudulent representations in the sale of defendant as her of a victim. The case was submitted for trial without a jury, and the court entered judgment in favor of the defendant. The case is brought here by appeal.

The evidence in the record tends to prove that the plaintiff is a native of Italy; that she had been in this country but a short time prior to October 11, 1915, when she purchased the victim in question from the defendant, paying him therefor \$100; that at the time of such purchase she was able to speak English but slightly; that she and her husband went to defendant's residence, and the defendant had reported to her that the victim was very old and was hard-of-hearing, that it was worth \$100, and was a good copy of a dead; that she had never heard of anything about victim, nor was she able to find out the defendant's representations.

Upon the trial plaintiff's counsel offered to

prove by plaintiff's husband that the representations in question were in fact made to defendant. The court refused to permit the husband to testify as to the representations made by the defendant in a conversation between the defendant and

plaintiff and her husband.

Plaintiff testified that she learned on October 30, 1915, for the first time that the violin she purchased from defendant was not a copy of an Amati; that it was not an old, hand-made instrument, but was a cheap, German factory-made violin, constructed so as to deceive inexperienced buyers, and that it was worth from \$35 to \$50. This evidence of the plaintiff is supported to some extent by that of another witness.

Plaintiff urges as grounds for a reversal of the judgment that the finding and judgment are against the law and the evidence, and that the court erred in not permitting her husband to testify.

The evidence in the case is conflicting, and had no error intervened at the trial we should not feel justified in interfering with the conclusion of the court below. It is our opinion, however, that the trial judge erred in excluding the testimony of plaintiff's husband. Under section 5 of chapter 51, Hurd's R. S., Illinois, a husband is not in general competent to testify to any transaction or conversation had during the marriage, in an action where the wife is a party. This section, however, excepts cases where the suit involves the separate property right of the wife, and cases where the husband has acted as the agent of such wife. The record establishes the fact that plaintiff's husband was present and did much of the talking with the defendant at the time the purchase of the violin was consummated. He attempted on the trial to testify to what representations were made by Printy, the defendant, to plaintiff and himself at that time. Objection was made to

plaintiff and her husband.

Plaintiff testified that she learned on October

30, 1919, for the first time that the violin she purchased

from defendant was not a copy of an Amati; that it was not an

old, hand-made instrument, but was a cheap, German factory-

made violin, constructed so as to deceive expert buyers,

and that it was worth from \$55 to \$60. This evidence of the

plaintiff is supported to some extent by that of another

witness.

Plaintiff might be known to a reviewer of

the judgment that the finding and judgment are against the

law and the evidence, and that the court acted in not per-

mitting her husband to testify.

The evidence in the case is conflicting, and

had no error intervened at the trial we should not feel

justified in interfering with the conclusion of the court

below. It is our opinion, however, that the trial judge

erred in excluding the testimony of plaintiff's husband.

Under section 3 of chapter 31, article 1, of the

constitution is not in general competent to testify to any

transaction or conversation had during the marriage, in an

action where the wife is a party. This section, however,

excepts cases where the wife survives and sues for injury

right of the wife, and cases where the husband sues for

the right of the wife. The second exception is that

the plaintiff is a party and the husband is a party to the

talking with the husband and the wife is a party to the

violation of the contract. It is our opinion that the

to that representation were made by him, and defendant,

to plaintiff and husband of the same. The evidence was

this testimony and the court sustained the objection on the ground that a husband cannot testify to conversations had between himself and the defendant in the presence of the witness' wife who is a party plaintiff in the suit.

"The objection that the husband of plaintiff was not a competent witness for his wife, is not well taken. The statutory disability is confined to the wife being competent to testify for her husband but does not affect the competency of the husband to testify in the wife's interest. Section 5, chapter 51, Revised Statutes, provides that where the wife would, if unmarried, be plaintiff or defendant, and where the litigation shall be concerning her personal property, the husband may testify in her behalf. Johnson v. McGregor, 157 Ill. 350. Plaintiff in this case sought to recover damages for an assault and battery made upon her by defendants. Her being covert in no way affected her right to maintain such action. The right was personal to herself, and her husband was therefore a competent witness in her behalf in force of the statute supra." Rago v. Veneziano, 155 Ill. App. 557.

We think that the evidence in this case satisfactorily shows that in the transactions referred to here the husband was in fact acting as agent for his wife; she was unable to speak much English, and the evidence tends to show that the business of purchasing the violin was in the main transacted between defendant and the plaintiff's husband. The mere fact that she was present and took some part in the conversation which finally resulted in the sale of the violin did not, as a matter of law, prevent her husband from acting at that time and under those conditions as her agent.

The judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

between himself and the defendant in the presence of the witness; wife and her party separately in the only ground that a husband cannot testify in conversations had with this testimony and the court sustained the objection on the

111. App. 587
force of the statute quoted." Thorne v. Venezziano, 100
land was considered a competent witness in her behalf in
action. The right was personal to herself, and her husband
being governed in no way interested was not to be examined even
assault and battery were taken not by defendant. Her
plaintiff in this case sought to recover damages for an
tity in her behalf. Thompson v. Robinson, 107 Ill. 350.
concerning her personal property, the husband may test-
self or defendant, and where the information will be
widest than where the wife would, it is immaterial, he is an
interest. Section 8, chapter 11, Illinois' statutes, pro-
the competency of the husband to testify in the wife's
competent to testify for her husband and none not allowed
the statutory disability is confined to the wife being
not a competent witness for his wife, is not well stated.
"The objection that the husband of a plaintiff was

-class page also in non-italic and bold style, etc.

[illegible]

...and I believe that the ...

THE UNIVERSITY OF CHICAGO

L. S. DICKY,
Appellee,

vs.

MARY WELLS, THOMAS E. WELLS,
JOHN E. WELLS, PRESTON A.
WELLS, Trustees under the
will of Thomas Edmund Wells,
deceased,
Appellants.

203 I.A. 305
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff was the lessee of an apartment in the steam-heated apartment building owned by the defendants. In April, 1914, the defendants were engaged in cleaning and repairing work in the building, and at the request of plaintiff's wife they removed a radiator from a bedroom and another from the dining room of the apartment; a few days thereafter the defendants placed a cap on the open pipe in the bedroom. The pipe in the dining room from which the radiator had been detached was left uncapped until the month of September, 1914, although plaintiff's wife had called the attention of one Wallace, defendants' foreman, and also the janitor of the building to it, and they had promised to protect it. During the absence of plaintiff and his family from the city, on September 10, 1914, steam was turned on in the building and the property of plaintiff was damaged by steam which escaped from the unprotected pipe in the dining room.

Judgment was entered in the Municipal Court in favor of plaintiff for the sum of \$110.90, and defendants bring the case here by appeal for review.

Notwithstanding the fact that this court has frequently called attention to the existence of its rules with relation to abstracts of record, the abstract in this case fails to comply with Rule 18 and is a mere index to the record.

and for this reason, if for no other, the judgment should be affirmed.

The defendants' main contentions are that the provisions of the lease under which plaintiff held the premises in question exempted defendants from any liability for the injuries alleged, in that it was not shown that they resulted from a "positive wrongful act" of the defendants, and that the verdict of the jury is against the manifest weight of the evidence.

We do not think there is much merit in either contention. Counsel for defendants rely upon a clause in the lease which, after providing for liability on the part of the lessee for almost every possible contingency that might occur in and about the demised premises, exempts the defendants from liability for any damage occasioned by steam and water pipes, etc., "except from the positive wrongful act of the lessor herein, or his employees." The radiator in question and the steam-heating plant of the building were, after the removal of the radiator from the dining room in April, 1914, in the possession and control of the defendants and their employees, and we are inclined to the opinion that the unprotected condition of the steam pipe in the dining room of plaintiff's apartment was the result of a positive wrongful act on the part of defendants' employees.

It is also our opinion that there was ample evidence taken at the trial to warrant the verdict of the jury and the judgment of the trial court.

The judgment in favor of plaintiff will be affirmed,

AFFIRMED.

and for this reason, it for no cause, the judgment should be affirmed.

The defendant's motion for judgment notwithstanding the verdict is denied. The evidence in question is not sufficient to establish that the defendant was negligent in that it was not shown that they realized from a "positive wrongful act" of the defendant, and that the verdict of the jury is against the conflict weight of the evidence.

It is not this court's duty to set aside the verdict of the jury in the absence of any evidence in the case which would justify the jury in its verdict. The evidence in this case is not sufficient to establish that the defendant was negligent in that it was not shown that they realized from a "positive wrongful act" of the defendant, and that the verdict of the jury is against the conflict weight of the evidence. The evidence in this case is not sufficient to establish that the defendant was negligent in that it was not shown that they realized from a "positive wrongful act" of the defendant, and that the verdict of the jury is against the conflict weight of the evidence.

It is also the opinion of the court that the defendant's motion for judgment notwithstanding the verdict is denied. The evidence in this case is not sufficient to establish that the defendant was negligent in that it was not shown that they realized from a "positive wrongful act" of the defendant, and that the verdict of the jury is against the conflict weight of the evidence.

In the matter of petition of
FRANTISKA DVORAKOVA, arrested
at the suit of MARY TREMBACZ,

On appeal of MARY TREMBACZ,
Appellant,

vs.

FRANTISKA DVORAKOVA,
Appellee.

203 I.A. 312

APPEAL FROM COUNTY COURT,
COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the County Court of Cook County releasing Frantiska Dvorakova from the custody of the sheriff of Cook County.

A petition filed January 5, 1916, in the County Court sets up that the petitioner, Frantiska Dvorakova, had been arrested under a writ of Ca. Sa. issued out of the Municipal Court of Chicago in favor of Mary Trembacz for the sum of fifty dollars and costs; that the petitioner was then in the custody of the sheriff under and by virtue of said writ, and that she was entitled to her release from such custody under the laws of the State relating to insolvent debtors.

On the trial in the County Court a certified copy of a judgment of the Municipal Court was introduced in evidence, from which it appears that a judgment was entered in that court on the 22nd day of November against petitioner for the sum of fifty dollars and costs.

The record of the trial in the County Court does not disclose the nature of the cause of action in which the judgment was entered in the Municipal Court, nor does it disclose whether the judgment was based upon a verdict or, if so, what the verdict of the jury was. In a colloquy between counsel and the court the following appears:

818 1 202

ALL INFORMATION CONTAINED

HEREIN IS UNCLASSIFIED

In the matter of Petition of
HELEN J. BROWN, et al.,
at the suit of JOHN W. BROWN,

On appeal of JOHN W. BROWN,
Appellant,

vs.

HELEN J. BROWN, et al.,
Appellees.

MR. JUSTICE OWEN delivered the opinion of the court.

This is an appeal from a judgment of the County
Court of Cook County sustaining a writ of habeas corpus
granted by the court of Cook County.

A petition filed January 1, 1911, in the court

of Cook County, Illinois, for a writ of habeas corpus, and
been granted under a writ of habeas corpus, and the writ

of fifty dollars and costs; and the petition was granted
the custody of the sheriff, and the writ of habeas corpus
and that the writ was granted to the petitioner for the custody

under the laws of the State of Illinois, and the writ was
granted to the petitioner for the custody of the child.

copy of a judgment of the court of Cook County, Illinois,
in evidence, from which it appears that the child was

born in Cook County, Illinois, and that the child was
petitioner for the custody of the child.

The record of the case in the court of Cook County

does not disclose the name of the child, and the court
the judgment was entered in the court of Cook County, Illinois,
it appears that the child was born in Cook County, Illinois,

it is, that the writ was granted to the petitioner for the custody
between counsel and the court the following facts:

The Court: "The verdict was for \$50?"

Mr. Peska: "In manner and form as charged in the statement of claim."

A document was introduced in evidence which counsel called a statement of claim, but that it was ever filed in the Municipal Court or that it had become a pleading in any litigation in that court does not appear by a certificate of the clerk of that court or otherwise. From the body of the paper it appears that Mary Trembacz complained that Frantiska Dvorakova had maliciously caused her arrest for disorderly conduct. The evidence submitted to the trial court did not tend to prove that the judgment of the Municipal Court was entered in an action of which malice was the gist. As a matter of fact, the only evidence which was properly admitted in the County Court was the record of the judgment of the Municipal Court, and this does not in any way disclose the nature of the claim, evidence or verdict upon which the judgment was based.

The judgment of the County Court will be affirmed.

AFFIRMED.

The Court: "The verdict was for \$500"
 Mr. Leake: "In manner and form as charged in
 the statement of claim."

A document was introduced in evidence which
 counsel called a statement of claim, but it was never
 filed in the Municipal Court or that it had become a writ-
 ing in any litigation in that court, and was not a
 certificate of the clerk of that court or otherwise from
 the body of the paper it was filed and produced from
 claimed that Yarnall had been a party to the
 her arrest for libelously charging. It was introduced
 to the trial court if it had to prove that the defendant
 of the Municipal Court was named in the statement of claim
 claim was the claim. As a matter of fact, the only evidence
 which was properly admitted in the trial court was the rec-
 ord of the judgment of the Municipal Court, and this was
 not in any way dispositive of the issue, and it was of
 verdict upon which the judgment was based.
 The judgment of the Municipal Court will be af-

irmed.

1912

SIDNEY L. STEIN and EDWARD J.
EHRHARDT, copartners, trading
as Stein & Ehrhardt,

Defendants in Error,

vs.

HERMAN EMERMAN, doing business
as H. Emerman & Company,
Plaintiff in Error.

203 I.A. 316

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Suit was brought in the Municipal Court by
plaintiffs on the following contract:

"It is hereby understood and agreed that Stein
& Ehrhardt are to receive \$400.00 as their part of com-
mission in the event the loan of \$18,500.00, second
mortgage is made and accepted on the property at 4513-35
Clifton avenue, and this amount is to be paid to you when
moneys are paid over on the second mortgage.

H. EMERMAN.

Accepted this 16th day of June, A. D. 1915.

STEIN & EHRHARDT."

The judgment of the Municipal Court was in fa-
vor of plaintiffs for the sum of \$400, and the case comes
here on writ of error for review.

The parties to the suit are real estate brokers,
and it is gathered from the record that plaintiffs did in
fact procure "a customer ready and willing and able to make
the loan," but that Emerman for reasons not appearing in the
record had refused to consummate the deal; he refused to pay
over to the plaintiffs the sum of \$400, relying upon the terms
of the contract.

We are inclined to the view that plaintiffs can
not recover on the contract in question without first showing
that the loan on the premises referred to was in fact made.
It is assumed that the parties were acting in the matter as

agents and not as principals; the contract involves a distribution between them of the commissions which would in the first instance have been received by the defendant in the event that the loan had been made and the moneys paid over on a second mortgage. The right of the plaintiffs was dependent upon the happening of the event referred to in the contract; it constituted a condition precedent to their right to recover.

The case is quite different from those cases in which the contracts with real estate brokers are to procure a purchaser willing, ready and able to purchase real estate; in such cases the broker has done everything required of him under his contract when he procures such purchaser. Here, however, the plaintiffs' right to recover did not rest upon their ability to procure a person ready, willing and able to make the loan; the contract specifically requires that the loan must in fact have been made and the moneys turned over before their right to compensation accrued.

"The intention (of the parties to a written contract) must be determined by considering not only the words of the particular clause, but also the language of the whole contract as well as the nature of the act required, and the subject matter to which it relates."
Bucksport, etc., R. Co. v. Brewer, 67 Me. 295.

Where the promise to pay money is conditioned upon the happening of a future event, the condition precedent must be exactly performed before the contract can be enforced. Cyclopedia of L. & P., vol. 9, p. 615; Eldridge v. Rowe, 7 Ill. 91; Kerfoot v. Steele, 113 Ill. 610.

The judgment of the Municipal Court will be reversed.

REVERSED AND JUDGMENT NIL CAPIAT.

agents and not as principals; the contract involved in the
 relation between them is the one which is the
 first instance have been received by the defendant in the
 event that the loan had been made and the money had been on
 a second mortgage. The first of the principles was dependent
 upon the happening of the event referred to in the contract;
 it constituted a condition precedent to the right to re-
 cover.

The case is entirely different from those cases in
 which the contracts with real estate brokers are to procure
 a purchaser willing, ready and able to purchase upon credit;
 in such cases the broker has done everything required of him
 under his contract when he procures such purchaser. Here,
 however, the plaintiff's right to recover is not based upon
 their ability to procure a person ready, willing and able to
 make the loan; the contract specifically required that the
 loan must be first made and the money must be paid over
 before their right to compensation accrued.

"The contract for the loan of money is a contract con-
 tract) must be determined by considering not only the
 words of the contract itself, but also the intention of
 the whole contract as well as the intention of the parties
 at the time it was made. 100 N.E. 2d 100, 101 N.E. 2d 100.
100 N.E. 2d 100, 101 N.E. 2d 100.
 where a promise to pay money is conditioned upon
 the happening of a future event, the condition need not first
 be exactly performed before the contract can be enforced. 100 N.E. 2d 100,
 101 N.E. 2d 100.
 31; 100 N.E. 2d 100, 101 N.E. 2d 100.
 The judgment of the court is affirmed with costs.

versed.

REVEREND AND HONORABLE JUDGES OF THE COURT

THOMPSON BROS. FEED COMPANY,
a corporation,

Appellee,

vs.

NEIMAN BROS. COMPANY,
a corporation,

Appellant.

203 I.A. 317

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in favor of the plaintiff, Thompson Bros. Feed Company, and against the defendant, Neiman Bros. Company. The plaintiff claimed that it had sold to the defendant certain merchandise, and that a balance was due from the defendant on an account stated of the sum of \$828.39.

T. O. Thompson, an officer of the plaintiff, testified that he had had conversations with the defendant's officers in reference to the account, and that Louis J. Neiman, treasurer of the defendant company, said that if plaintiff would allow a disputed item of \$105 the balance of the account, \$828.39, would be paid; that Alexander Neiman, president of the defendant company and a brother of Louis, also said "that he would take care of us, he would give a chattel mortgage and that everything would be all right"; that a statement of the account was mailed to the defendant every month, and that the Neimans had never questioned its correctness except as to the matter of the \$105 item which plaintiff allowed to defendant.

It is clear from the evidence in this case that the defendant company must be held to have accepted the statement of the account as presented to it, and that its duly

EXHIBIT 100-25558

U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20535

THOMSON BROS. RENTAL COMPANY,
a corporation,
Appellee,

vs.

WILLIAM BROS. RENTAL COMPANY,
a corporation,
Appellant.

MR. JUSTICE STEVEN DUBOIS, JR. filed the following opinion:

This is an appeal from a judgment of the United States Court of Appeals in favor of the appellant, William Bros. Rental Company, and against the appellee, Thomson Bros. Rental Company. The plaintiff claims that it had sold to the defendant certain merchandise, and that a certain sum was due from the defendant on an account stated of the sum of \$828.39. T. O. Thompson, an officer of the plaintiff, testified that he had had conversations with the defendant's officers in reference to the account, and that he had been told that the defendant was not going to pay the account. The plaintiff would also have introduced evidence of the account, \$828.39, which was paid; that the defendant's president of the defendant company had a letter of intent also said "that he would take care of it, and would give a check for it." The plaintiff also introduced evidence that a statement of the account was made by the defendant every month, and that the plaintiff had never received the correct amount except as to the matter of the first item which plaintiff allowed to defendant. It is clear from the evidence that the defendant company must be held to have received the amount of the account as presented to it, and that the only

authorized officers had promised to provide for its payment.

The evidence heard on the trial tends to prove that the transactions between the parties to the suit extended over a period of about two years. It appears that Alexander Neiman, the president of the defendant company, had been adjudicated a bankrupt some time before the suit was brought, and he and Louis, his brother, endeavored by their testimony to prove that the claim of the plaintiff was for merchandise delivered to Alexander Neiman and not to the defendant corporation.

We are inclined to the view that the trial court was authorized under the evidence taken to find as it did, that the claim of plaintiff arose on an account stated. "Evidence of assent as to the correctness of an account may be found in circumstances from which such assent may be inferred, as where one party presents an account to another, which the latter retains without making objection within a reasonable time. * * * Where an account is rendered and only one item thereof is objected to at the time, there is an admission of the correctness of the other items to which no objections are made." 1 Cyc., pp. 375 and 378, and Neagle v. Herbert, 73 Ill. App. 17.

In State v. Ill. Central R. R. Co., 246 Ill. 246, the court said: "In ordinary business transactions, if an account has been transmitted from one individual to another it will be deemed a stated account from the presumed approbation or acquiescence of the parties, unless an objection is made thereto within a reasonable time."

The action here is based upon the new promise to pay or to provide for the payment of the balance as shown by the stated account, and on this question sufficient evi-

authorized officers had declined to provide for its payment.

The evidence heard on the trial tends to prove

that the transactions between the parties in this suit extended over a period of about two years. It is a fact that Alexander Weismann, the president of the defendant company, had been adjudicated a bankrupt some time before the suit was brought, and his son Louis, his brother, succeeded him in his testimony to prove that the claim of the plaintiff

was for merchandise delivered to Alexander Weismann and not to the defendant corporation.

We are inclined to the view that the trial

court was satisfied under the evidence taken to find as

it did, that the claim of plaintiff arose from an account

stated. "Evidence of a debt as to the correctness of an

account may be found in circumstances from which such an

account may be inferred, and there are many cases in which

counts as against, which the plaintiff is entitled to

objection within a reasonable time. * * * and in such

cases it is reasonable and proper to allow the plaintiff to

at the trial, there is an inference of the correctness of

the other items no matter how numerous and small they are.

pp. 375 and 376, and Wheeler v. Wheeler, 137 N.Y. 101, 102.

In Wheeler v. Wheeler, 137 N.Y. 101, 102.

346, the court said: "The evidence in this case is not

if an account has been established, the court is bound to

whether it will be due to the plaintiff account for the amount

aggregation or deduction to be made, and the court is

action is more proper than a reasonable doubt."

The action has been based upon the law of the state

to pay or to provide for the payment of a debt or a sum

by the stated account, and on this question defendant is

dence was submitted at the trial to support the findings of the trial judge.

It is contended that the Neimans, president and treasurer of the defendant company, could not bind their corporation by accepting or agreeing to the account stated. We do not agree with this contention. The plaintiff claimed that a balance was due it from the defendant for merchandise sold and delivered; it submitted to defendant a statement of its claim, and the defendant, by its proper officers, agreed in effect, according to the testimony of plaintiff's witnesses, that the statement was correct. "Appellee's suit was upon an account stated, and upon nothing else. If there were no stating of an account, then appellee had no case. * * * The president and secretary of appellant are presumed to have authority to make and render the statement in question." Pick & Co. v. Slimmer, 70 Ill. App. 358.

The defendant does not contend that there was any fraud, error or mistake in the making of the account stated; its defense is that no account had in fact been stated as between itself and the plaintiff; that the debt was in fact due plaintiff from the president of the defendant company individually, and that the agreement of defendant to pay the debt was voidable under the Statute of Frauds, and further that the agreement to pay the debt of its individual stockholder was ultra vires the defendant company.

In the affidavit of merits filed by the defendant in the Municipal Court it appears that the defendant denied that it acknowledged the account stated or that it promised to pay the balance shown to be due thereon. Had defendant admitted the stated account relied upon by plaintiff, and had it in its affidavit of merits charged that the indebtedness claimed was incurred by another and that its

denance was admitted at the trial to support the findings of the trial judge.

It is contended that the balance, president and

treasurer of the defendant company, could not have been

corporation by receiving or agreeing to the account stated.

We do not agree with this contention. The plaintiff claimed

that a balance was due it from the defendant for merchandise

sold and delivered; it admitted to defendant a statement of its

claim, and the defendant, by its proper officers, signed in

effect, according to the testimony of plaintiff's witnesses,

that the statement was correct. "Replied" suit was then

an account stated, and then nothing else. If there were

no setting of an account, then specified and no case. * * *

The president and treasurer of defendant are presumed to

have authority to make and verify the statement in question.

Pick & Co. v. Slinger, 70 Ill. App. 328.

The defendant does not contend that there was

any fraud, error or mistake in the signing of the statement

stated; its defense is that no account was in fact given

stated as between itself and the plaintiff; that the same was

in fact the plaintiff from the president of the defendant

company individually, and that the plaintiff's statement

pay the debt was voidable under the statute of Illinois, and

further that the agreement to pay the debt of the plaintiff

stockholder was given under the defendant company.

In the affidavit of the plaintiff it is alleged that the

and in the defendant's court it appears that the plaintiff

that it acknowledged the account stated of the plaintiff

promised to pay the balance shown to be due the plaintiff, and

defendant admitted a stated account relied upon by plaintiff.

It is also alleged in the affidavit of the plaintiff that the

indebtedness claimed was incurred by another and that the

promise to pay the obligation was void for the reasons urged by it, a more serious question would be presented. The defense of the Statute of Frauds and that the promise of defendant was ultra vires that corporation comes too late; these defenses should have been specifically set up in the affidavit of merits. The affidavit of merits charges that "he is informed and believes that some amount of money may be due * * * by one Alexander Neiman to the plaintiff and that plaintiff has attempted to saddle said indebtedness upon this defendant corporation. * * * that said corporation could not under the law assume to pay an obligation of an individual," etc. This is not by any means a claim that the indebtedness sued on was that of another, or that defendant had entered into a voidable agreement to pay such indebtedness. The propositions of law should have been tendered before the announcement of final judgment.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

promised to pay the bill when he called the day before
by it, the service question which was presented.
tenant of the building and the fact that the
tenant was living there and the question of the
these of these and the fact that the tenant
efficiency of the building. The efficiency of the
"he is informed and leaves with a number of things
be due * * * by one Alexander and the fact that
and that the tenant was attempted to pay the bill
upon this defendant's condition. The fact that the
tion could not under the law be made an obligation of
an individual," etc. This is not a statement of the
the indebtedness was made on the part of the tenant
tenant had a right to a statement of the indebtedness
indebtedness. The procedure of the law is not
dered before the defendant's obligation is
including the fact that the tenant was
Judgment will be entered.

CHARLES W. GILLETT,
Plaintiff in Error,

vs.

ELIZABETH PARKER BRYANT,
formerly Elizabeth Parker
Gillett,
Defendant in Error.

203 I.A. 322

ERROR TO THE CIRCUIT

COURT OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The parties to this review were husband and wife. They were divorced by decree entered May 28, 1912. The hearing was on bill of the wife charging habitual drunkenness of the husband, who answered denying the drunkenness charged, to which answer a replication was filed. The decree found the husband guilty of the drunkenness charged, and that he was an unfit person to have the care, custody, control and education of the two children of the marriage, Charles W. Gillett, Jr., and Elizabeth Gillett, who at the time of the entry of the decree were respectively seven and four years of age, and their custody, nurture and education were by the decree awarded to the mother, without any interference on the part of the husband, until the further order of the court. The alimony of the wife and her solicitor's fees were settled by the payment of a lump sum, presumably by agreement of the parties, as the record is silent as to any contest on this phase of the litigation. In accord with the decree the children resided with their mother for a little more than a year after the divorce, when on May 31, 1913, she married Harold J. Bryant, a British subject, since which event the children have lived with their mother and her present husband at Lake Forest in this State.

On December 28, 1915, the defendant in the divorce suit, pursuant to notice dated October 13, 1915, filed his petition praying that that part of the decree providing for the care and custody of the children be changed from their mother to himself. This petition was not filed until the hearing had been entered upon before the Chancellor in open court. Thereafter by leave of court Mrs. Bryant filed her answer to the petition nunc pro tunc as of the date when the petition was filed. On January 13, 1916, after an extended hearing before the Chancellor, a decree was entered denying the prayer of the petition, but so modifying the divorce decree as to give the petitioner the right to visit his children and to talk to and be with them once in each week free from the interference or espionage of their mother or her agents or servants or any one acting in her behalf, and under such conditions as would afford petitioner an untrammelled opportunity to gain the love and affection of the children, and specifying Saturdays in each week between the hours of twelve o'clock noon and six o'clock in the evening as the time in which he might take the children with him from the place of meeting without the interference of any one; and further provided that the children should be personally delivered at twelve o'clock on each Saturday to petitioner at the Deer Path Inn in the city of Lake Forest, to which place petitioner should return them at six o'clock of the same day. Ample and liberal provisions were made to meet such contingencies as sickness of the children and their absence with their mother on their vacations, failure of petitioner to call for them at the appointed time, etc. The decree further recites "that it is advisable for the present that

the petitioner be given charge and control of said children only during the periods hereinafter specified, with the intent, however, that as soon as the petitioner and said children shall have become better reaccustomed to each other the petitioner may, upon a showing to the court of proper home surroundings for said children, be given the right at certain times to have charge and control of said children at night as well as during the day, provided the education of said children is not thereby interfered with." The decree also directed that the children should be known by their father's name and not by the name of Bryant, which since their mother's remarriage she had adopted for them. The decree gave to petitioner the right to apply to the court for further order and direction in the premises. Petitioner being dissatisfied with the decree prosecutes this writ of error. The parties will hereinafter be referred to respectively as petitioner and respondent.

There is much scandalous matter in this record which it is unnecessary for this court to repeat in order to arrive at an understanding of the cause and a determination of the rights of the parties. We shall therefore refrain from so doing in the interest of decency and particularly of the children of the contestants.

Two questions are in our judgment of conclusive importance in this proceeding. First, the welfare and the best interests of the children of the parties; and, second, whether the learned Chancellor has abused that judicial discretion which the law reposes in a chancellor in this class of cases.

As a general rule children of tender years - as are the children of the parties to this controversy - will not be taken from the custody of their mother where such

the petitioner be given charge and control of said children only during the periods hereinafter specified, with the intent, however, that as soon as the petitioner and said children shall have become better reconciled to each other the petitioner say, upon a showing to the court of proper home surroundings for said children, be given the right at certain times to have charge and control of said children at night as well as during the day, provided the education of said children is not thereby interfered with. The decree also directed that the children shall be known by their father's name and not by the name of Brown, which since their mother's marriage and had adopted for them the decree gave to petitioner the right to bring to the court for further order and direction in the premises. Petitioner being dissatisfied with the decree proposed this writ of error. The parties all participated in the decree to respectively as petitioner and respondent. There is no question raised in this record which is unnecessary for it is found to be in error to arrive at an understanding of the decree and a determination of the rights of the parties. It will therefore remain from so doing in the interest of saving the parties individually of the children of the respondent. Two questions are in our mind as to the importance in this proceeding. First, the petition and the best interests of the children of the parties, and second, whether the court in deciding the matter has shown that it has discretion which the law requires in a custody case in these cases of cases.

As a general rule children of both parents are to be the children of the parties to this controversy - will not be taken from the custody of their mother when such

mother is physically, morally and by general environment a proper person for them to live with and be controlled by. The evidence in the record abundantly demonstrates that respondent is a proper person to have the care and custody of her children, and that it is for the best interests and welfare of the children that they remain in her custody and subject to her control. Petitioner is, we think, disqualified by his own conduct from having the exclusive charge and control of his children. Notwithstanding the fact that he has been weaned from his former drunken habits and is now a sober, temperate man - which the decree before us in terms finds - the fact remains that for more than three years the petitioner made no attempt to see his children, but abided by the decree in this regard, and that during that time he did not in fact see either of them. At their tender years it would not be unnatural if so long an absence had worked forgetfulness of their father in their immature memories. The love of children for parents is not inherent; it is acquired and comes by cultivation, thoughtfulness, and kindly acts of tenderness day by day in their nurture and bringing up; these are the things which engender love of the child for its parents. Constant agreeable association of parents and children inspires love and affection, while absence and neglect beget forgetfulness and kill love and affection which may formerly have existed. Looking to the best interests of these children and their care and nurture, it was, in the circumstances appearing in this record, but the exercise of sound, humane, judicial discretion in the Chancellor to allow the mother to retain their custody. The record is replete with the testimony of well known personages that the children have a mother's care in the most

approved and ethical way; that they are carefully nurtured, that their health and their morals and their intellectual training are carefully looked after and supervised; that they are envired by refining influences, living in a home of culture, and that Mr. Bryant is a man of means and refinement, and is attached to and fond of the children, and that his influence over them is for their good.

It is clear from the record that to change the custody of the children from the mother to the father would be a great injustice to them. Notwithstanding the fact that petitioner's mother, a most estimable and capable woman, is willing and has agreed to take charge of the children and to assist petitioner in their care, nurture and education, it would be contrary to their interests and welfare to change their custody at this time even in these promising conditions. All things being equal as between the mother and the grandmother, the mother has the preference in law in the matter of the custody and nurture of her children.

The fact that respondent's husband is a British subject and that by her marriage her political status follows that of her husband, will not while the parties live within the jurisdiction of the court affect the right of the mother to the custody of the children where it is for their best interests that they remain in her custody. The children are American citizens notwithstanding the status of their mother as to her citizenship, and they will necessarily so remain and be subject to the jurisdiction of the court and from time to time to its further order concerning their custody, as their welfare may demand. Draper v. Draper, 68 Ill. 17.

It is complained that the children are being estranged from their father. We find no evidence in the

approved and official way; it shows the conservative character
 that their health and the interests of their families
 training and especially looked after and supervised; that they
 are employed in certain, intelligent, living in a place of
 culture, and that the very nature of the work and the
 men, and the very nature of the children, and that
 his influence on them is for their good.

It is a fact that the children of the poor are
 a very different kind of children from the children of the
 rich. They are not only different in their physical
 constitution, but in their mental and moral constitution. They
 are not only different in their physical constitution, but in
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 constitution. They are not only different in their physical
 constitution, but in their mental and moral constitution.

The fact that the children of the poor are different
 from the children of the rich is a fact that is often
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 from the children of the rich is a fact that is often
 overlooked. It is a fact that the children of the poor are
 different in their physical constitution, but in their mental
 and moral constitution. They are not only different in their
 physical constitution, but in their mental and moral constitution.

record on which to found such complaint. The incident of the boy thinking his father stole his pony is not to be marveled at considering the facts and the boy's youth. Petitioner kept polo ponies one of which the boy rode. When the parents separated the father kept the ponies and the boy was without one. Childlike he missed the pleasure the pony afforded him and in his innocence attributed the deprivation to his father, - a most natural conclusion from conditions evident to the boy's immature mind. The incident of the destruction of his mother's picture by his father had also made an indelible impression upon the boy's mind; but these incidents furnish no evidence of an attempt on the part of respondent to estrange the boy from his father. The fact that he had forgotten his grandmother Gillette is not at all to be wondered at when it is borne in mind that the boy had not seen her for years.

While it is true that respondent has been allowed to take the children out of the jurisdiction of the court into the state of Florida, where respondent's husband has possessions, such absence from this jurisdiction has been temporary only and is so understood by all of the parties concerned. At these times the children remained with respondent and her husband as a family in the same way as when they are in Mr. Bryant's Lake Forest home. Petitioner has made no representation to the Circuit Court of any anticipated danger of the children being permanently taken from the jurisdiction of the court. When such danger exists it will be time, when the court is moved in the matter, to enter an order which shall operate to prevent the children from being taken away from the state of their birth and the country of which they are citizens.

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There is nothing in the decree from which this court can hold that the Chancellor did not exercise the judicial discretion reposed in him under section 18, chapter 40, R. S., in a reasonable way and in accord with the situation which confronted him. Nor are we able to say that such discretion is abused by any of the terms of the decree. The rights of the parties and of the children have, we think, been properly conserved by the decree, and under the statute as well as the terms of the decree either of the parties is at liberty to apply to the court for such orders as under any changed conditions which may arise may be deemed necessary.

The jurisdiction of the court continues in all matters touching the custody and control of the children. In this regard the children are the wards of the court, and the respondent is amenable to the future orders and directions of the court in relation to them.

We have given due consideration to the rulings of the Chancellor upon the proofs and particularly upon the evidence proffered by petitioner and excluded, and find such rulings are not subject to the objections thereto argued by counsel for petitioner and that in such rulings there is no reversible error.

The decree of the Circuit Court does justice between the parties and the children, the subject matter of the controversy, and is therefore affirmed.

AFFIRMED.

There is nothing in the decree from which this
court can hold that the Chancery has no authority to
judicial discretion regarding in the matter of the
chapter to, . . . in a no way and in accord with
the situation which confronted him. Now and we are to say
that such discretion is assessed by any of the terms of the
decree. The rights of the parties and of the children have,
we think, been properly covered by the decree, and under
the statute as well as the terms of the decree, and the
rights is at liberty to apply to the court for such orders
as and any changed conditions which may arise may be
deemed necessary.

The jurisdiction of the court continues in all
matters touching the custody and control of the children.
In this regard the children are the wards of the court, and
the respondent is amenable to the court's orders and directions
of the court in relation to them.

We have given our consideration to the rights
of the Chancellor, of the trustee and of the children, and the
evidence proffered by petitioner and answer, and find that
rulings are not subject to the effect and are more rightly by
counsel for petitioner and that in such rulings there is
no reversible error.

The decree of the court is affirmed, and the subject matter of
between the parties and the children, the subject matter of
the controversy, and is therefore affirmed.

PEOPLE OF THE STATE OF
ILLINOIS ex rel. EMMA
L. PARKER,
Plaintiff in Error,

vs.

MRS. WILLIAM BRYSON,
Defendant in Error.

203 I.A. 325

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a habeas corpus proceeding involving the custody of a female child. The relatrix ^{was} ~~is~~ the mother of the child, and the respondent, who has had the custody of the child from the day of its birth, claims ^{ed} ~~the~~ the child as her own by a sort of prescriptive right based on possession and the alleged abandonment by the mother. There ^{had} ~~have~~ been no adoption proceedings instituted at any time. There ~~is~~ ^{was} no legal tie that ^{bound} ~~binds~~ the respondent to the child and no contractual relation, either express or implied, between the mother and the respondent affecting the custody and disposition of the child. There ^{was} ~~is~~ no existing contract by which respondent could be compelled against her will to retain the custody of the child and to support and care for her. When respondent received the child she knew not from whence she came. She had not seen the mother; neither did she ever at any time seek her or attempt to obtain any ratification of this action by either the mother or any person having any legal right to the child or bearing any relationship to her. ^{she}

That respondent has taken excellent care of the child and provided for her to the best of her ability and in accord with her means and the station in life in which

55C.A.I. 303

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L. PARKER,
ILLINOIS ex rel. WEAVER
PROBATION OF THE STATE OF

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Defendant in Error, Mrs. William J. Hall, Jr.

1. The first part of the document is a letter from the author to the reader, explaining the purpose of the study and the methods used. The letter is dated 1964 and is addressed to the reader.

[illegible]

she moves, and that she has much maternal affection for the child must be conceded. That it may be a hardship for respondent to part with the child and that so to do will bring anguish to her heart are no sufficient reasons for overriding the law and disregarding the superior natural rights of the mother, unless, in so doing, the welfare of the child will be affected to her detriment.

The rights of respondent primarily rest in the solution of the question as to whether relatrix, the mother of the child, intentionally abandoned her when she, on the day of her birth, allowed her to be taken from her. If there was no such abandonment, then the claims of respondent fail, unless it can be said that relatrix is an unfit person to have the custody of the child or that the welfare of the child will be best served by leaving her with respondent. In deciding the question of abandonment, the intention of the mother at the time of the surrender is the principal factor. Such intention must be gathered from the situation of the relatrix and all the attendant circumstances and conditions.

~~At the inception of Relatrix's troubles her situation was tragic. She had been deceived by her lover, Dr. Parker. She had indiscreetly yielded to his embraces, relying upon his promise to marry her and, inferentially, to care for her in any situation in which she might find herself as the result of her imprudent conduct with him. When she discovered she was pregnant she kept her counsel and confided in no one but the man responsible for her trouble. Dr. Parker was a man of mature years, but not brave; he was willing to let all the pain and anguish of mind rest upon the woman he had betrayed. At the time of the love making~~

relatrix was employed in the household of Dr. Parker in Vermont, Illinois. That household consisted of himself and his mother, a selfish old lady upwards of eighty years of age, who had procured Dr. Parker to promise that he would not marry during her lifetime. To save a scandal in the little country town of Vermont, Dr. Parker packed relatrix away to Chicago, giving her money and a letter to a Dr. Bacon of Chicago and the Polyclinic hospital. All that thereafter transpired concerning the birth of her baby and its being sent to respondent was under the direction of Dr. Bacon, acting for Dr. Parker, to all of which relatrix was a passive, yielding, uncontentious victim.

Parker, in fulfilment of his promise, legitimized his unborn infant by secretly marrying relatrix at Milwaukee, Wisconsin. Barring the time when Dr. Parker and relatrix were with each other at the time of their secret marriage and his departure from Chicago after that event to his home in Vermont, relatrix did not again see her husband. She was left to shift for herself as best she might under the directions of Dr. Bacon, acting for her husband. She had promised to keep their secret, and as matter of fact she told no one of her condition and plight, not even her own father.

When the pangs of maternity came she was alone in her anguish. Dr. Bacon at the Polyclinic hospital directed affairs, not at the request of relatrix but at the direction of Dr. Parker, which fact was unknown to relatrix and never communicated to her by her husband, Dr. Bacon or anyone else. Her baby was, under the direction of Dr. Bacon, acting in collaboration with Dr. D. A. K. Steele of Chicago, taken from her and was without relatrix having been

relaxer was employed in the household of Mr. and Mrs. J. H. ...
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told at the time the baby's destination, delivered to respondent at the University hospital, where she held out to her friends that she had been delivered of relatrix's baby, although she was at the time, by reason of surgical operations, incapable of bearing a child.

Dr. Bacon was acting for Dr. Parker in an attempt to conceal from his family and friends the undisputed fact that he was the father of relatrix's baby. Bacon was a partisan. He was acting for Dr. Parker; he was callous to the rights or feelings of relatrix; he was cold-bloodedly serving his friend. In the light of all the facts we cannot say that relatrix consciously abandoned her baby. While, before her pains of maternity had scarcely ceased, she allowed her baby to be taken from her under a secret arrangement between her husband and Dr. Bacon, to which she passively assented, this did not constitute conscious abandonment of her child. She says she expected in time that her husband would take her and her baby home. What was more natural for her to expect? To do so was Dr. Parker's moral and paternal duty. With the shame of concealment of the birth of her legitimate child resting upon her and the neglect at this trying time of her husband, who should have been with her to sustain and comfort her in her distress, she was in no condition to decide (if she had been free to do so, which she was not) about the child's disposition. Dr. Parker was guilty of abandonment of the child, but not so his wife. Her subsequent conduct demonstrates that she wanted to ascertain who had her child and where the child was. Dr. Bacon refused information when interrogated upon the subject, and there was no other person to aid her. There were many things which she could have done and proceedings which she could have instituted, but she evidently had neither the

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courage nor the ability to proceed with them. She was dominated by the wish of her husband and ruled by the conduct of Dr. Bacon.

Dr. Parker's mother died before the birth of the child and yet he did not change his attitude, which he readily might have done, but continued to leave relatrix to her own resources to preserve the secret of her approaching maternity. It was only when Dr. Parker died that the facts of his relationship with relatrix and the birth of their child became known, and through a search for the child as heir of her father the child's whereabouts were discovered. Immediately upon relatrix discovering her child with the respondent she demanded the child, and failing to obtain it instituted this proceeding. She acted promptly in demanding her right to the child as soon as she discovered that she was with respondent. Laches is therefore not attributable to her. We therefore hold that neither in fact nor in law has relatrix abandoned her child. The findings of the trial Judge against relatrix are not only not sustained by the proofs, but are contrary to such proofs and their manifest weight.

Two other points remain for disposition, viz:

1. The fitness of relatrix to have the custody of her child.

2. The welfare of the child.

First, the mother, the father, as in this case, being dead, is the natural guardian and custodian of her own child, and her rights will not be infringed or curtailed unless there is something in her life and conduct which makes her an undesirable character to be entrusted with the care and nurture of her child. This record not only fails to

encourage her the ability to proceed with them. The law should
be based by the wish of her husband and child. The consent of
Dr. Bacon.

Dr. Bacon's mother died before the birth of the

child and yet he did not change his attitude, which he
readily might have done, but continued to leave nothing to
her own resources to preserve the secret of her maternity.
It was only when Dr. Bacon died that the truth

of his relationship with relative was the truth of their
child became known, and there is a secret, but the child as
well of her father and child's anonymity were discovered.

Immediately upon relative discovering her child with the
respondent and demanded the child, and failing to obtain it
instituted this proceeding. The secret promptly in demand

her right to the child as soon as she discovered that she
was with respondent. It is therefore not surprising
to her. The respondent told her that she was in law
has relative demanded her child. The child of the child
Judge and her relative are not only not named by the
proceeds, but are contrary to the law. The child is a
weight.

Two other points remain for consideration, viz:
1. The license of relative to have the custody

of her child.

2. The welfare of the child.

First, the license. The law is not clear, but it is
being held, is the natural guardian and the child is
child, and her rights will not be infringed by child and
there is a question in her life and conduct. The law
not in substance is subject to be amended. The law
and nature of her child. This record not only fails to

establish anything derogatory to the character of relatrix, but all the evidence on that subject demonstrates that she is of excellent character; that she is a woman of ^{education,} refinement and of exemplary conduct, and that the only criticism upon her life or character possible to be indulged are the acts which culminated in the dilemma in which she found herself in indiscreetly yielding herself to the author of her troubles. We therefore hold that she is a fit person to have the care, custody and nurture of her child.

Second - the welfare of the child. Surely it cannot be gainsaid that, all other things being equal, it is for the best welfare of a child to be brought up by its own mother rather than to be reared by a foster mother, however good and circumspect such foster mother may be.

Let us view for a moment the temporal and social side of these two women who are contending for the mothering of relatrix's child. The record fails to disclose any Mr. Bryson, so we will assume that Mrs. Bryson is a husbandless woman. Mrs. Bryson testified that she is employed by the telephone company from 5:30 to 9:30 in the evening; that in addition to her wages she has a house from which she receives ten dollars a month as rent for "downstairs" and that she lives "upstairs." What she does with the baby while she is at work she did not explain in her testimony, but her witness, Mrs. Weber, testified that when respondent is not at home her mother takes care of the baby. Respondent's stepfather testified that she works nights, goes to work about five o'clock or four o'clock and works until nine, sometimes ten. The baby is in his store from four until ten. On the other hand, the mother of the child has a little money and a home for the child on her father's farm, where she can give the child her maternal and undivided attention and care

and rear the child in the atmosphere of a healthy country environment. The child will have with her mother the protection of her mother's father and the care which the grandfather will naturally extend to his granddaughter; she will have the advantage of a family life and be environed with her natural kin and with a mother's care, undisturbed by daily attention to telephonic duties. We think it clear that it is decidedly to the welfare and best interests of the child that she be brought up and cared for by her mother and that the social, moral, physical and educational training of the child will be best promoted by awarding her to her own mother.

It is argued by counsel for respondent that relatrix's conduct is not actuated by affection for her child, but by a sordid desire to obtain the little insurance money due the child under a policy on her father's life. The facts as well as the acts of relatrix refute this aspersion. It is alleged and not denied that relatrix has borne the expense of this protracted and costly litigation, which must of necessity largely exceed the child's insurance money; and, furthermore, it is not challenged but that relatrix, as guardian of her child, has collected such insurance and invested the same under the direction and with the approval of the Probate Court of Cook County. This insinuation against relatrix's honesty of purpose falls of its own weight.

This case is before the court for the second time. The law of the case is as announced in an opinion by Mr. Justice Barnes, Gen. No. 21232, with which we are most heartily in accord. This opinion is binding on all the parties, including this court on this review. The proceedings on the second trial but accentuate the view of this court as voiced by the opinion of Mr. Justice Barnes and

confirm that opinion in every essential particular.

For the reasons above appearing the judgment of the Superior Court is reversed and the cause is remanded to the Superior Court with directions to enter a judgment granting the prayer of the petition for habeas corpus and awarding relatrix her child, now in the custody of respondent and known as "Baby Bryson."

REVERSED AND REMANDED
WITH DIRECTIONS.

confirm that opinion in every essential particular.
For the reasons above appearing the judgment
of the Superior Court is reversed and the cause is remanded
to the Superior Court with directions to enter a judgment
granting the prayer of the petition for habeas corpus and
awarding relief as called for in the body of respondent
and known as "Baby Ryan".

REVEREND AND HONORABLE
JUDGE OF THE SUPERIOR COURT.

170 - 22597

J. E. SLATER,
Plaintiff in Error,

vs.

ELBERT D. BALL,
Defendant in Error.

203 I.A. 332

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended writ of error. The action involves a note for \$451.50, in which defendant was liable as maker. He defended on the ground and claim that the note had been paid by the conveyance of an Indiana farm; that plaintiff agreed to surrender the note canceled to defendant when the conveyance was delivered but through inadvertence, defendant claims, the note was not surrendered, and sometime after the settlement claimed this suit was instituted.

The trial was before the court with a jury. The verdict was in favor of defendant, with which, after overruling motions of plaintiff for a new trial and in arrest of judgment, the trial judge evidenced his agreement by entering a judgment upon the verdict and against plaintiff for costs.

The questions are all of fact. There are no errors of procedure or in rulings upon the evidence which would warrant the trying of the case again. There are no instructions abstracted, and consequently no question arising upon the method or matter about which the jury

203 LA 388

J. E. GLASSER,
Plaintiff in Error,

ERROR TO

MUNICIPAL COURT

vs.

OF CHICAGO.

EDWARD D. BALL,
Defendant in Error.

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

This is an understood bill of error. The action

involves a note for \$451.80, in which defendant was liable

as maker. He defended on the ground and claim that the

note had been paid by the conveyance of an Indiana farm;

that plaintiff agreed to surrender the note canceled so

defendant when the conveyance was delivered but through

inadvertence, defendant claims, the note was not surrendered,

and sometime after the settlement claimant this suit was

instituted.

The trial was before the court with a jury.

The verdict was in favor of defendant, with which, after

overruling motions of plaintiff for a new trial and in

arrest of judgment, the trial judge evidenced his

agreement by entering a judgment upon the verdict and

against plaintiff for costs.

The questions are all of fact. There are no

errors of procedure or in rulings upon the evidence which

would warrant the trying of the case again. There are no

instructions objected, and consequently no question

existing upon the record or matter about which the jury

were instructed, if at all.

The court did not err in denying plaintiff's motion for an instructed verdict. The evidence was sufficiently in conflict to call for the jury's judgment thereon. Whether the conveyance of the Indiana farm was that of a fee or subject to a condition of defeasance is unimportant. Was the conveyance given and received in payment and satisfaction of the note in suit? That is the question. The jury said it was. The trial Judge agreed with the conclusion at which the jury arrived, and so do we. While the burthen of proving payment was upon the defendant, we think he abundantly sustained such burthen by a clear preponderance of the evidence.

As we cannot say that the verdict and judgment are manifestly contrary to the probative force of the evidence, the judgment of the Municipal Court is affirmed.

AFFIRMED.

were instructed, it is all.

The court did not err in denying plaintiff's motion for an instructed verdict. The evidence was conflicting in conflict to call for the jury's judgment thereon. Whether the conveyance of the Indiana farm was that of a fee or subject to a condition of reversion is immaterial. Was the conveyance given and received in payment and satisfaction of the note in issue? That is the question. The jury said it was. The trial judge agreed with the conclusion at which the jury arrived, and so do we. While the burden of proving payment was upon the defendant, we think he abundantly sustained such burden by a clear preponderance of the evidence.

As we cannot say that the verdict and judgment are manifestly contrary to the preclusive force of the evidence, the judgment of the Municipal Court is affirmed.

ATTEST.

H. M. FREEMAN,
Appellee,

vs.

J. T. COUNSELL,
Appellant.

203 I.A. 333
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On June 16, 1914, defendant executed and delivered to one P. A. Hines a promissory note with a power of attorney to confess judgment in the sum of \$448.04, the note being payable September 14, 1914. Hines, the payee, was before maturity of the note adjudged bankrupt, and plaintiff is the purchaser of the note through the Hines bankruptcy proceedings. The note not being paid at maturity, judgment thereon was entered by confession July 16, 1915. Defendant was notified of the judgment the day it was entered and subsequently requested to pay it. With actual knowledge of the judgment from the day of its entry, defendant took no steps to open it until September 30, 1915. The petition then filed was denied by the court, but on a further petition of defendant the judgment was opened on October 28, 1915. The court might well have denied all the motions to open the judgment on the ground of laches. Hall v. Jones, 32 Ill. 38.

On a hearing before the court the judgment was reinstated, from which this appeal followed.

Hines and Counsell and one W. H. Smith owned the stock of the Minden Edison Light & Power Company. Hines also owned an unincorporated bank, known as the "Madison Street Bank." The Minden corporation had borrowed \$1225 of the bank, for which the bank held two notes, one for \$1,000 and the other for \$225, dated May 22, 1913, and payable six

303-383

H. M. ...
J. T. ...
A ...

MR. JUSTICE ...

On June 16, 1914, defendant executed and delivered to one J. A. ...
to confess judgment in the sum of \$488.75, the note being payable September 14, 1914. ...
maturity of the note ...
purchaser of the note through the ...
ings. The note not being ...
was entered by confession July 16, 1915. Defendant was notified of the judgment ...
requested to pay it, with actual knowledge of the judgment from the day of its entry, defendant took no steps to open it until September 26, 1915. The petition when filed was denied by the court, but on a further motion of defendant the judgment was entered on October 21, 1915. The court might well have denied the motion to open the judgment on the ground of laches. All J. ...
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the other for \$250, dated May 1, 1915, and ...

months after date. When the notes matured they were extended for a period of six months, which made them again mature May 22, 1914. On June 12, 1914, the LaSalle Street Trust and Savings Bank failed, and P. A. Hines, the owner of the Madison Street Bank, had all his available funds on deposit in that failed institution and was sorely pressed for funds with which to pay his depositors. Defendant was importuned to pay the notes of the Minden Company due the bank, and finally the matter was compromised by defendant giving his check for \$800 and the note in suit. Hines at the same time assigned twenty-four shares of stock in the Minden Company to defendant. Defendant claims that Hines at the time the note in suit was delivered, and as part of the consideration of the transaction, delivered to him the following agreement:

“I agree to pay to P. A. Hines Four Hundred Forty-eight Dollars and Four Cents (\$448.04), subject to the following conditions:

1. That all matters relating to the Minden Edison Light & Power Company, now handled by P. A. Hines, or relatives, be brought up to date and all collections made and forwarded to me.

2. That no claim for services shall be rendered against the Minden Edison Light & Power Company or me personally by P. A. Hines or relatives, except that of Clara M. Hines already agreed on.

P. A. Hines.”

We are unable to discover from this writing any contractual obligation between Hines and defendant. It is a nudum pactum. It is like a man shaking hands with himself - it is meaningless.

Defendant, however, claims many things for this so-called contract, and he was permitted by the trial Judge to put most of them into the record, but therefrom we are unable to say that they present any defense for the non-payment of the note. Certainly there was no failure of consideration. The consideration was the indebtedness of the Minden Company, of which defendant was the principal stock-

months after date. When the notes matured they were discounted for a period of six months, which made them again mature May 28, 1914. On June 12, 1914, the available street fund and Savings Bank failed, and J. A. Jones, the owner of the said son Street fund, had all his available funds on deposit in that failed institution and was thereby stranded for funds with which to pay his depositors. Reference was furthermore made to the notes of the failed fund, and the bank, and finally the notes were returned to the depositor having the check for \$1000 and the note in hand. Jones at the same time cashed twenty-four hundred dollars in the failed fund, and to defendant. Defendant at the same time at the same time note in suit was delivered, and as part of the consideration of the transaction, defendant gave to the following defendant:

[illegible][illegible]

Kinden County, of which defendant was the principal stockholder. The corporation was not a party to the transaction of the note, and defendant was not a party to the same. The corporation was not a party to the same. The corporation was not a party to the same.

holder, evidenced by its notes which Hines surrendered to defendant for his \$800 check and the note in suit. There is nothing in this record to show even from defendant's contentious viewpoint that Hines did not substantially perform what is claimed to be the terms of the agreement of June 16, 1914.

The difficulties are of defendant's own making. He insists that the contract is something entirely different from that which its words import. Giving to those words the most liberal construction in defendant's favor, we can not say the evidence shows that Hines did not do all the things in that agreement required of him. There is no evidence that he has any of the assets of the Minden Company or that any of his relatives have any.

This is not like an ordinary action at law. Errors of procedure have been waived, and because the judgment was opened the effect of the stipulations in the power of attorney waiving errors of procedure was in no sense abrogated.

The trial Judge did justice between the parties on the evidence, and upon the case as a whole presented by such evidence. Defendant failed in presenting any meritorious defense. Technical legal defenses are closed to him in this case.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

LOCKWOOD & STRICKLAND COMPANY,
a corporation,
Appellant,

vs.

CITY OF CHICAGO, a municipal
corporation,
Appellee.

203 T.A. 336

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit in which plaintiff seeks to recover from the City of Chicago the sum of \$2,694 paid to it under the terms of an ordinance vacating an alley. Plaintiff, besides the consolidated common counts, filed a special count, in which the ordinance in question is declared upon and set out in haec verba. To this special count defendant interposed a general demurrer, which, being sustained, the suit was dismissed and this appeal followed.

The right to maintain the action rests in the interpretation of the ordinance and the ordinance being before the court in the special count, the court will interpret it and declare its legal purport and effect regardless of the erroneous conclusion of the pleader. The question of the right to maintain the action is one of law for the court, and that right rests in the legal interpretation of the liability of the city to refund the sum paid by plaintiff under the terms of the ordinance. Binz v. Tyler, 79 Ill. 248. The question involved is novel and, we think, one of first impression. No case directly in point has been cited, and an independent search has failed to disclose any. The briefs

LOCKWOOD & STRICKLAND
a corporation,

Appellant,

vs.

CITY OF CHICAGO, a municipal
corporation,

appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLCOMB delivered the opinion of the court.

This is an action of trespass in which plain-

tiff seeks to recover from the City of Chicago the sum of
\$2,694 paid to it under the terms of an ordinance providing

an alley. Plaintiff, besides the consolidated common

counts, filed a special count, in which the ordinance in

question is declared upon and set out in good form. To this

special count defendant answered a general answer, which,

being sustained, the suit was dismissed and this appeal fol-

lowed.

The right to maintain the action rested in the

interpretation of the ordinance and the ordinance being a mere

the court in the special count, the court will interpret it

and declare its legal effect and effect of repeal of the

extraneous constitution of the ordinance. The question of the

right to maintain the action is not at law for the court,

and that right vests in the legal interpretation of the in-

ality of the city to return the sum paid by plaintiff under

the terms of the ordinance. Winn v. City of Ill., 248.

The question involved is novel and, we think, one of first

importance. No case directly in point has been cited, and no

independent research was called to disclose any. The court's

of counsel afford but little aid to solve the point involved, and we shall decide the case in accord with our own impression of the force and effect of the ordinance, treating the ordinance as the contract of the parties, in force of which their rights and obligations must be ad-measured.

Plaintiff attempted to set up in the special count the running of the statute of limitations, and it is objected that this pleading is bad because the exceptions which arrest the running of the statute, if any exist, are not in some suitable language negatived. This contention is untenable. If the running of the statute has been arrested in any manner, that is matter of defense and need not be anticipated in the initial pleading. People for use, etc. v. May, 276 Ill. 332. The point cannot be reached by demurrer but must be availed of by plea. Plaintiff seeks to recover the amount paid the city under Sec. 2 of the vacating ordinance, which reads:

"The vacation herein provided for is made upon the express condition that Lookwood & Strickland Company, a corporation, shall, within sixty (60) days after the passage of this ordinance, pay to the City of Chicago the sum of twenty-six hundred ninety-four (2694) dollars toward a fund for the payment of any and all damages which may arise from the vacation of said alley."

The plaintiff avers that it fully complied with the terms of the ordinance and among other things paid the City \$2694 within sixty days after the passage of the ordinance.

The ordinance vacating the alley is a valid ordinance and within the power of the city council to enact. This power carried with it the right to impose reasonable terms as a sine qua non to the ordinance becoming effective. The pay-

ment of the money by plaintiff settled the question of the power of the City to exact such payment. The payment being voluntary and not by compulsion, plaintiff is estopped from now questioning the legality of its exaction. There is no question in this case as to whom the vacated land reverted. In no aspect of the case is the court informed as to the status of the vacated land, and no such question is raised by the pleadings. The sole question is, can plaintiff recover back from the city the money which it paid under the ordinance.

It is the fact that the money, by the terms of the ordinance, was paid "toward a fund for the payment of any and all damages which may arise from the vacation of said alley." May this condition be treated by the city as ascertained and liquidated damages between the parties? The odd amount exacted and paid would indicate that some mathematical calculation as to damages had been indulged. Can we say from the language of the ordinance that it was the intention of the parties that there should be any repayment, or that the money was paid simply as security against the city's being thereafter mulcted in damages for vacating the alley? If any such intention prevailed in the minds of the parties, they certainly failed to use any language in the ordinance to so indicate. The ordinance is in a measure like unto a bond of indemnity or bail bond. In contracts of this nature and quality the rights of the parties are controlled by the conditions of the bond. In an agreement of indemnity where money is deposited, the right either to keep or demand a return of the money is regulated by the terms of such agreement, and so we think the terms of the ordinance are regulative of the rights of the parties and

ment of the money by plaintiff settled the question of the power of the city to exact such payment. The payment being voluntary and not by compulsion, plaintiff is estopped from now questioning the legality of its exaction. There is no question in this case as to whom the vacated land reverted.

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the ordinance, was paid "toward a fund for the payment of any and all damages which may arise from the vacation of said alley." It is this condition be created by the city as

ascertained and liquidated damages between the parties. The odd amount exacted and paid would indicate that some mathematical calculation as to damages had been made. Can we say from the language of the ordinance that it was the intention of the parties that there should be any re-

payment, or that the money was paid simply as security against the city's being thereafter entitled to sue for vacating the alley? If any such intention was implied in the

language of the ordinance, they certainly failed to reach the minds of the parties, they certainly failed to reach the language of the ordinance to be intended. The ordinance is in a measure like that of a contract or a deed.

In contract, of this nature and quality and like of the parties are controlled by the good faith of the contract, an agreement of indemnity of the money is required, and either to keep or demand a return of the money is regulated by the terms of such agreement, and to be bound by the terms of the ordinance are relative of the rights of the parties and

we find no provision in it for the return of the money paid.

In the arguments of counsel it appears that plaintiff is in the actual possession of the vacated alley, and has been since the ordinance became effective, by the payment of the money now sought to be recovered back. While the city could not sell the land vacated, neither could it have been coerced into vacating the alley so that plaintiff might become possessed of it. But the city did vacate the alley and conforming to the terms of the ordinance plaintiff paid the price which gave vitality to the ordinance. If, as contended, plaintiff could not have been compelled to make the payment, then the paying of the money was purely a voluntary act, and it is elementary law that money voluntarily paid cannot be recovered in an action at law.

The special count demurred to did not state a cause of action and the demurrer was therefore properly sustained.

It is our opinion that the city is not liable under the ordinance set out in the special count to refund the money paid by plaintiff to make that ordinance operative.

The judgment of the Superior Court is affirmed.

AFFIRMED.

we find no provision in it for the return of the money.

paid.

In the arguments of counsel it appears that

plaintiff is in the actual possession of the money and has been since the ordinance passed effective, by the payment of the money now sought to be recovered back. While the city could not sell the land vacated, neither could it have been covered into vacating the city as was plaintiff might become possessed of it. But the city did vacate the alley and according to the terms of the ordinance plaintiff paid the price which gave title to the land. It, as contended, plaintiff could not have been so held to make the payment, when the price of the money was purely a voluntary act, and it is elementary law that money voluntarily paid cannot be recovered in an action at law.

The special court learned so and has found a cause of action and the defendant was therefore properly sustained.

It is our opinion that the city is not liable under the ordinance but in the payment of the money paid by plaintiff to the city for the land vacated.

The judgment of the superior court is affirmed.

ATTEST.

6061985

221 - 21616.

GENERAL CEMENT GUN COMPANY,
a corporation,

Defendant in Error,

vs.

THE TEMPLE ENGINE AND PUMP
COMPANY, a corporation,

Plaintiff in Error.)

203 T.A. 338

ERROR TO

MUNICIPAL COURT,

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

The General Cement Gun Company, a corporation,
brought suit in the Municipal Court of Chicago, against
The Temple Engine and Pump Company, a corporation, to
recover the purchase price of a gasoline engine. The
case was tried before the court and a jury. A verdict
was returned in favor of the plaintiff for \$850, on
which judgment was entered and defendant prosecutes this
writ of error.

In 1913, the plaintiff was under contract to
do some work for the City of Nashville, Tennessee, and
sought to purchase from defendant certain machinery re-
quired in the prosecution of the work. After considerable
correspondence between the parties in this regard, an
agreement was finally entered into, whereby the defendant
sold to plaintiff a gasoline engine, pump, tank, clutch
and pulley for \$920. The defendant guaranteed the engine
in certain respects, and agreed that if it was not as
guaranteed, it might be returned and the purchase price
refunded. The defendant in accordance with the agreement

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shipped the machinery to plaintiff at Nashville. Shortly after the engine was put into operation, certain parts of it broke. Plaintiff then returned the engine to defendant at Chicago, demanded that the purchase price be refunded, and upon the defendant's refusing to do so, this suit was instituted.

It appears from the evidence that on August 21, 1913, the defendant wrote the plaintiff describing the engine, pump, tank, clutch and pulley, and giving the sales price, \$850 for the engine, \$39 for the pump, \$6 for the tank and \$25 for the clutch and pulley. The defendant therein stated that it would guarantee the engine to be economical in the consumption of fuel and oil and entirely successful on kerosene; that it would develop "full rated horse power;" that the material and workmanship was of the best and that it would take the engine back at the full price paid if it was not as represented. The next day defendant again wrote plaintiff pointing out the good qualities of the engine, giving the number of revolutions per minute that the engine would operate, and the number of horse power it would develop; and stated that if it did not fulfill all of the claims made in the letters and catalogue, plaintiff might return it within thirty days and defendant would thereupon refund the purchase price in full. Three days later, August 25th, the defendant again wrote the plaintiff stating that they would allow a period of sixty days instead of thirty days in which the engine could be had on approval by the plaintiff, and that if at any time within sixty days after the purchase, plaintiff found the engine "to be other than we have represented it in our

previous correspondence to you, or in our catalogue, we will either make it right or you may return it to us, and we will refund you your money in full." On the same day, plaintiff wrote the defendant, "Please ship the following goods:" Then follows a description of the engine, pump, tank, clutch and pulley. All of the goods were to be purchased for the sum of \$920. The letter further stated: "This order is given on condition that you guarantee the above engine to be perfect in all respects and to develop continuously 50 H.P. at 50 R.P.M. with kerosene fuel, using not to exceed 1/10 gallon H.P. per hour and that further you will refund the price of this equipment at any time within sixty days from the date of shipment if the engine does not make good as above." Afterwards on the same day, the defendant wrote the plaintiff acknowledging receipt of the order, describing the machinery and price in the same language used by the plaintiff. The letter then stated: "This engine is guaranteed to develop continuously 50 horse power with kerosene fuel, not using an excess of one-tenth gallon per horse power per hour. This engine is also guaranteed to be free from any imperfections in material and workmanship throughout the whole life of the engine. If the engine does not do as guaranteed, and the defect is reported to us within sixty days of date of delivery, we hereby agree to make any imperfections right or to take back the engine and refund the whole of the purchase price."

The defendant contends that this last letter written by it constitutes the contract; that prior negotiations were merged in the contract, and therefore it was error to admit in evidence any of the prior correspondence or testimony as to prior negotiations.

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The first type is ...
The second type is ...

There follows a description of the wine, which, although

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Journal of Management Studies, 19(1), 67-80.

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Page 11 of 11

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES

The witness McIntyre, on behalf of the defendant, testified that C. L. Dewey, representing the plaintiff, called at the defendant's place of business, August 25th, and handed the witness the written order above mentioned; that thereupon the witness and Dewey submitted the order to Kennedy, superintendent of the defendant company; that it was then agreed that the "500 R.P.M.", mentioned in the order should be stricken out, and that, as the order provided that the engine might be returned within sixty days instead of thirty if not as represented, plaintiff should not have the option of returning the goods, but defendant should have the option of repairing any defect that might develop, or have the engine returned and refund the purchase price. The superintendent Kennedy also testified on behalf of the defendant, but did not corroborate McIntyre in this regard, nor was he asked any questions concerning the changes above mentioned. Counsel for defendant stated in their brief that the testimony of McIntyre in reference to these changes was not contradicted, and argue that it is therefore conclusively established that defendant's letter of August 25th constitutes the contract between the parties. If counsel's statement in reference to this testimony were born out by the record, there would be much force in his contention, but we find that the testimony of McIntyre is squarely contradicted by Dewey. Dewey testified on behalf of the plaintiff that he did not go to defendant's place of business on August 25th, but mailed the order and that the conversation testified to by McIntyre did not occur; that he never agreed that any change could be made in the order. Plaintiff contends that the order it mailed to the defendant August 25th together with previous conversations and corres-

pendence between the parties constitute the contract. The contention of the defendant that all prior negotiations were merged in the contract as set forth in its letter of August 25th, and that prior correspondence was inadmissible to vary the terms of the contract, has no application to the facts of this case. The question was not one of varying a written instrument by parol evidence, but it was a question for the jury to determine what constituted the contract between the parties. Previous correspondence and oral testimony were therefore properly admitted in evidence so that the jury might determine under the instructions of the court what the contract between the parties was.

Defendant next contends that the contract was one entire transaction and not severable; that it could not be rescinded in part and affirmed in part, and that as plaintiff returned only the engine and did not return the other machinery, the court should have instructed the jury, as requested, at the close of the plaintiff's case, to find the issues for the defendant.

In support of this contention, it is argued that as the contract, evidenced by defendant's letter of August 25th, provided for the sale of the several items of machinery for a lump sum of \$920, without any separate prices for the different items, it conclusively shows that the transaction was entire and not severable. In defendant's letter of August 25th, it is stated that if the engine does not do as guaranteed, and if it is shown to be defective, and the defects are not cured, the defendant "will take back the engine and refund the whole of the purchase price." It will be noticed that nothing is said about the defendant's taking back any of the other machinery. In plaintiff's

order of August 25th, it is stated that if the engine is not as represented, the defendant agrees to refund the purchase price of the equipment. From a consideration of all the testimony in this regard, and holding, as we do, that the question as to what the contract was, was a proper question for the jury, we are of the opinion that the question whether the contract was severable, was likewise properly submitted to the jury.

Defendant further contends that the verdict is not supported by the evidence, in that the contract, which was embodied in defendant's letter of August 25th, provided that if the engine was not as guaranteed, the plaintiff should report any imperfections, and that these should then be remedied by the defendant; that the plaintiff did not give the defendant an opportunity to repair the engine, and that it could not return the engine without having first given the defendant an opportunity to do so. It is conceded that by the terms of plaintiff's order of August 25th, it had the option to return the machinery, and as we have stated, it was a question for the jury as to what the contract was. The court instructed the jury on the theory contended for by both parties as to which had the option in this regard. The jury by their verdict found what the contract was, and under the instructions of the court found that the plaintiff had the option of returning the machinery. This contention of the defendant is therefore untenable.

Defendant also contends that the court erred in charging the jury that it was admitted that the cost price of the engine was \$850. In support of this contention, it is

[illegible]

urged that all the machinery was sold for one sum, \$920, and that there was not a separate price for each item. We think there can be no question that the evidence shows the price of the engine was \$850.

Objection is also made to the instructions of the court, in that they are contradictory, as to which of the parties had the option of returning the engine. It was entirely proper for the court to give instructions embodying both the plaintiff's and the defendant's theory of the case. Furthermore, defendant did not make this objection at the time the instructions were given, and is therefore not in a position to do so in this court. Bent v. Farnald, 159 Ill. App. 552.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

wishes that all the necessary was sold for one price, \$1000, and that there was not a separate price for each item. He thinks there can be no question that the value of the price of the engine was \$1000.

Opinion is also made to the instructions of the court, in that they are contradictory, as to which of the parties has the option of returning the engine. It was simply proper for the court to instruct the jury to return the engine to the plaintiff and the defendant's theory of the case. Furthermore, it seems that the court did not give the jury the time for instructions were given, and the instruction in question is to be in the court. *Boyd v. Smith*, 101 Ill. App. 528.

Nothing is reversible error in the court, the judgment of the court is affirmed. *Boyd v. Smith*, 101 Ill. App. 528.

LINCOLN ELECTRIC HEATING APPLIANCES,
Incorporated,

Defendant in Error,

vs.

RICHARD A. SCHULTZ,

Plaintiff in Error.

203 I.A. 340

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The Lincoln Electric Heating Appliances, incorporated, brought this suit against Richard A. Schultz, to recover \$1000 damages. The case was tried before the court without a jury, and judgment was entered in favor of plaintiff for the amount of its claim. To reverse this judgment the defendant prosecutes this writ of error.

~~The record is in hopeless confusion, but we are able after much labor to ascertain that~~ Plaintiff furnished materials to the defendant, with which the latter was to make certain parts of electric lanterns for the plaintiff. Defendant also agreed to make certain dies and other tools for the plaintiff. Several orders were given by the plaintiff, and some of these were paid for in three different payments, aggregating \$175. It also paid \$138.60 under protest February 8, 1915.

Plaintiff contends that it is entitled to recover from the defendant the amount which it has paid, \$313.60 and this apparently was the view of the trial court. We, however, are of the opinion that the \$175 paid by the plain-

043 11308

LITTON MURKIN: THIS MATTER IS
INCORPORATED

Defendant in Error

Plaintiff in Error

Plaintiff in Error

Plaintiff in Error

RICHARD A. GUNTER

Plaintiff in Error

THE DEFENDANT'S MOTION FOR JUDICIAL NOTICE

of the court.

The Lincoln Electric Heating Appliances, Inc.

incorporated, and its assets and liabilities are

to be determined. The case was tried before the

court without a jury. Judgment was entered in favor of

plaintiff for the amount of its claim. It is now the

defendant's motion for judgment that is before the

The record in this case is as follows:

Lincoln Electric Heating Appliances, Inc. is a

corporation organized under the laws of the State of

Ohio. Its principal office is located at 1111 North

Highway 100, Columbus, Ohio. It is a corporation

with a capital stock of \$1,000,000.00, divided into

1,000,000 shares of \$1.00 each. It is a corporation

with a paid-up capital of \$1,000,000.00. It is a

corporation organized under the laws of the State of

Ohio. Its principal office is located at 1111 North

Highway 100, Columbus, Ohio. It is a corporation

with a capital stock of \$1,000,000.00, divided into

1,000,000 shares of \$1.00 each. It is a corporation

tiff cannot be recovered by it. Plaintiff contends that this amount was not paid, but was given to the defendant in the form of a loan, but we are firmly of the opinion that this contention of the plaintiff was an afterthought. When this money was paid, plaintiff had examined and accepted the work which defendant had done. Plaintiff was experienced in that line of business, and is now estopped from making any claim to the \$175.

The record shows that on February 3rd, plaintiff demanded the return of considerable material which it had theretofore delivered to the defendant, to be used in the making of the lanterns. The defendant refused to deliver any of this material until plaintiff paid certain bills amounting to \$138.60. Plaintiff contended that it did not owe this amount, nor any part of it, but in order to obtain its material which it needed to fulfill an existing contract, it paid this amount under protest in writing. A witness for the plaintiff testified that the several bills which the defendant tendered aggregating \$138.60 were false bills; that some of them had already been paid, and his version seems to have been adopted by the trial court, and we are unable to say that this finding is manifestly against the weight of the evidence. Money paid under these circumstances is recoverable. Hollingshead & Blei v. Pittsburgh Steel Co., Gen. No. 21324, Appellate Court, First Dist.; City of Chicago v. N. W. Mutual Ins. Co., 218 Ill. 40; Rees v. Schmidt, 164 Ill. App. 250; Chicago Tel. Co. v. Illinois Glass Co., 234 Ill. 535.

it cannot be recovered by it. Plaintiff's contention that this amount was not paid, but was given to the defendant in the form of a loan, but we are firmly of the opinion that this contention of the plaintiff was an afterthought. When this money was paid, plaintiff had no need and necessity of the work which defendant had done. Plaintiff was experienced in the line of business, and is now separated from making any claim to the \$175.

The record shows that on February 2nd, 1911, defendant demanded the return of a certain material which it had theretofore delivered to the plaintiff, to be used in the making of the lantern. The record is not clear as to whether any of this material was still in the plaintiff's possession amounting to \$125.00. Plaintiff contended that it did not owe this amount, nor any part of it, but in order to obtain the material which it needed to fill an existing contract, it paid this amount under protest in writing. A witness for the plaintiff testified that he saw the plaintiff's check for defendant tendered aggregating \$125.00 with a fee bill; that none of them had already been paid, and his version seems to have been adopted by the trial court, and is now upheld by the fact that this finding is in itself against a witness for the defendant. When paid to the plaintiff, the money is not recoverable.

Reaffirmed in W. H. Nuttal v. W. H. Nuttal, 111 Ill. App. 2d, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Included also in the amount of the judgment is \$210 which the plaintiff claims as loss of profits on a contract which it held, occasioned by the failure of the defendant to complete his work in accordance with his agreement. There is no evidence in the record that tends to show how much profit, if any, plaintiff would have made on this contract, nor does the evidence show that plaintiff's contract was lost by reason of the failure of the defendant in any particular. This item, therefore cannot be allowed.

The court also allowed the plaintiff and included in the judgment items of \$123.39 and \$405.19, making a total of \$528.58, being the value of the materials returned by the defendant to the plaintiff at the time the plaintiff made the payment under protest. The evidence shows that some of this material was delivered to the defendant on February 2nd and 3rd, and it was all returned to the plaintiff on February 8th. It also shows that a great part of the material was in the same condition when returned as it was when delivered to the defendant, and there is no evidence showing why this would be of less value when returned to the plaintiff than it was when in the hands of the defendant. A witness for the plaintiff did testify, however, that he examined this material after it was returned and that it was of no value, except as junk, but this valuation is not sustained under the evidence in this case, in the absence of any showing why it depreciated in such a short space of time. The evidence also shows that some of this material had been worked upon in making the lanterns; how much does not appear. The burden was upon the plaintiff to prove the amount of its damages, and it has not sus-

Included in the drawing of the machine is
\$100 which the defendant claims is a loss of profits on a
contract which is held, evidenced by the fact of the
defendant to complete his work in accordance with the
agreement. There is no evidence in the record that came to
show how much profit, if any, plaintiff would have made on
this contract, nor does the evidence show that plaintiff's
contract was lost by reason of the taking of the paper and
in any particular. This issue, therefore, is not decided.

The court also found the plaintiff and defendant
in the judgment items of \$110.00 and \$100.00, being a total of
of \$210.00, being the value of the machine and the value of
the defendant to the plaintiff as shown by the evidence
made the payment under protest. The evidence shows that
some of this material was delivered to the defendant in
February, 1934, and it was also delivered to the plaintiff
on February 28th. It also shows that a great part of
the material was in the same condition when returned to the
defendant as when delivered to the defendant, and it is not evi-
dence showing why this value of lost value should be
to the plaintiff that it was lost to the defendant, and
therefore, it is found that the defendant is entitled to the
value of the material which was lost to the plaintiff, and
that it was of the value, and it is found that the
is not material which the plaintiff is entitled to, and
the value of the material which was lost to the plaintiff
of value. The court also found that the defendant had
material had been worked upon in making the machine,
much does not appear. The finding was upon the evidence
to prove the value of the machine, and it is found that

tained that burden in reference to these materials. It is therefore not entitled to have included in the judgment the item of \$528.58.

The other items claimed by the plaintiff are for expenditures made by it for correspondence, advertising, agents, cartage, and rent and help while its factory was idle. There is no evidence in the record to justify recovery of any of these items.

The judgment of the Municipal Court of Chicago will therefore be reversed, but the cause will not be remanded, as the facts are sufficiently before us. We hold that the plaintiff is entitled to recover \$138.60 and no more.

The judgment of the Municipal Court of Chicago is therefore reversed and judgment will be entered in this court in favor of the plaintiff for \$138.60.

JUDGMENT REVERSED AND JUDGMENT HERE.

It is stated that the person in question is not a resident of the State of New York and that he is not a citizen of the United States.

The person in question is not a resident of the State of New York and that he is not a citizen of the United States. It is stated that the person in question is not a resident of the State of New York and that he is not a citizen of the United States.

It is stated that the person in question is not a resident of the State of New York and that he is not a citizen of the United States. It is stated that the person in question is not a resident of the State of New York and that he is not a citizen of the United States.

It is stated that the person in question is not a resident of the State of New York and that he is not a citizen of the United States. It is stated that the person in question is not a resident of the State of New York and that he is not a citizen of the United States.

326 - 21722

MAX NICKOL,

Plaintiff in Error,

vs.

DWIGHT M. CLARK and
JOHN E. TRAEGER, Sheriff
of Cook County, Illinois,

Defendants in Error.)

203 T.A. 342

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

This is a proceeding for the trial of right
of property, brought by Max Nickol against Dwight M.
Clark and John E. Traeger, Sheriff of Cook County, Illi-
nois. The case was tried before the court, without a
jury, who found that the right to the property was in the
defendants, and judgment was entered on the finding. To
reverse this judgment, plaintiff prosecutes this writ of
error.

The evidence tends to show that Leonhard Januchowski purchased the property involved in this proceeding, one seven passenger automobile, from the plaintiff. Neither the date of the purchase nor the price which was to be paid appears. On October 19, 1914, there was a balance due of \$400. On that date Januchowski borrowed \$350 from the plaintiff and executed a chattel mortgage on the automobile for the amount he then owed, \$750. This mortgage was not recorded. The indebtedness covered by the mortgage became due February 19, 1915, and on that date, Januchowski being unable to pay plaintiff, delivered the automobile to him,

280 - 2132

MAX 2132

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and thereupon plaintiff canceled the indebtedness and chattel mortgage. At the same time Januchowski executed and delivered a bill of sale for the automobile to plaintiff. The automobile was left with plaintiff until February 22, 1915, when it was again returned to Januchowski. At that time the parties executed a written agreement whereby plaintiff loaned to Januchowski the automobile, for a term of eight months. The agreement provided that "after the expiration of eight months the party of the second part (Januchowski) agrees to pay to the party of the first part (plaintiff) the sum of nine hundred dollars therefor receiving title resp. Ownership papers (Bill of Sale) from the party of the first part. In case the party of the second part shall refuse to pay the amount of \$900 at the expiration of eight months, then he shall pay to the party of the first part \$150, One Hundred Fifty Dollars for damages." It further provided that Januchowski should carry the license and keep the automobile in good condition and repair, all at his own expense.

The defendant Clark obtained a judgment against Januchowski, April 7, 1915. Execution was issued on this judgment and the automobile taken by the sheriff. This action was thereupon brought by the plaintiff to recover the automobile. It further appears from the evidence that Januchowski on March 24, 1915, made an affidavit, which was filed with the Secretary of State, for the purpose of obtaining a license to operate the automobile, wherein he stated that he was the owner of the car and had owned it for two years.

and the person plaintiff notified the respondents and
plaintiff's attorney. At the same time Januchowski executed
and delivered a bill of sale for the automobile to
plaintiff. The automobile was left with plaintiff until
February 28, 1915, when it was again returned to Januchowski.
At that time the parties executed a written agreement whereby
plaintiff loaned to Januchowski the automobile, for a term
of eight months. The agreement provided that after the
expiration of eight months the party of the second part
(Januchowski) agrees to pay to the party of the first
part (plaintiff) the sum of nine hundred dollars therefor
receiving title back. Ownership papers (Bill of Sale)
from the party of the first part. It was the intent of
the second part shall return to the party of the first part
at the expiration of eight months, when he shall pay to
the party of the first part \$100, or towards fifty dollars
for damages. It further provided that Januchowski should
carry the license, and keep the automobile in good condition
and repair, all at his own expense.

The defendant took delivery of the automobile on
January 7, 1915. Plaintiff was issued to him
license and the automobile was so by the sheriff. The
automobile was delivered to the party of the first part to receive
the automobile. It further provided that the party of the first part
should on March 14, 1915, when an order was issued to obtain
title and the ownership of same, for the purpose of obtain-
ing a license to operate the automobile, should be stated
that he was the owner of the automobile and should be for the
same.

Counsel for plaintiff contends that the transaction between the plaintiff and Januchowski was a bailment, and was not a conditional nor an absolute sale; that the automobile belonged to plaintiff, and therefore was not subject to be taken to satisfy a judgment against Januchowski. A great many authorities are cited from this and several other states of the union, as well as text writers, on the subject of sales. It would serve no useful purpose to analyze or discuss the authorities cited, for the reason that after a careful examination of the entire record, we are firmly of the opinion that the cancellation of the mortgage, the execution of the bill of sale, the surrender and return of the automobile, and the agreement executed February 22nd, were a mere subterfuge and no title passed from Januchowski to the plaintiff. It must also be borne in mind that all the testimony as to the affidavit filed with the Secretary of State for the license came from the plaintiff and Januchowski. None of the documents executed by the parties was filed for record.

But, even if we should hold that the contract executed by the plaintiff and Januchowski February 22nd was valid, yet the plaintiff could not maintain this action, for after the expiration of eight months, Januchowski had the option to pay the plaintiff \$900 and retain the car, or return it and pay \$150 for its use.

The judgment of the Municipal Court was right, and it is affirmed.

AFFIRMED.

• (1) ...

JAMES L. MARINO, for use of
Frank Surianello,
Plaintiff in Error,

vs.

ANTONIO PARISI and NICOLA MONACO,
Defendants in Error.)

203 I.A. 352

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

James L. Marino, for use of Frank Surianello,
brought garnishment proceedings against Antonio Parisi and
Nicola Monaco. The case was tried before the court without
a jury, the issues were found in favor of the garnishees
and judgment entered on the findings. To reverse this judg-
ment, the plaintiff prosecutes this writ of error.

It appears that on April 22, 1915, Surianello obtained
a judgment against Marino for \$97.10 and \$3 court costs. An
execution was issued thereon and returned "no property
found." There after this suit was brought.

The garnishees filed an answer averring that they were
not indebted to Marino at the time of the service of sum-
mons. The evidence tends to show that on June 8, 1915,
Marino entered into a contract with Monaco whereby Marino
was to construct a certain flat building for the sum of
\$6600, \$300 cash, \$300 upon demand, and the balance \$6000
to be paid on certificates issued by the architect from
time to time as the work progressed, such certificates to be
for eighty-five percent of the estimated work done and the

22.1.208

TO: BOB LEE, WILSON & LEE
FROM: [REDACTED]
SUBJECT: [REDACTED]

DO NOT WRITE IN THESE SPACES

THE FOLLOWING IS A SUMMARY OF THE RESULTS OF THE
ANALYSIS OF THE DATA FOR THE YEAR 1964

10/19/2011 10:07:52 AM 10/19/2011 10:07:52 AM

from the Government of the Republic of the Philippines, Department of Education, Office of the Secretary, Manila, Philippines, dated 1964.

It is a pleasure to have you here, and we are glad to hear that you are well.

[illegible][illegible][illegible]

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

balance of fifteen per cent to be retained until the completion of the building. By the terms of the contract Marino expressly waived any and all liens for himself as well as all sub-contractors. It further appears that the garnishee Parisi had entered into a contract with the co-garnishee Monaco whereby Parisi agreed to loan Monaco \$6400 to be used in paying for the construction of the building, the payments to be made by Parisi from time to time as the work progressed. The evidence further shows that at the time of service summons on the garnishees \$600 had been paid Marino on account of the work; that subsequently and prior to the trial there was a further payment made to the contractor Marino of about \$1500; ^{and} that there were considerable sums of money due for work performed and materials furnished by sub-contractors and material men. From the foregoing it clearly appears that Marino had no claim or demand against the garnishee Parisi, and therefore the judgment in favor of said garnishee was proper. Webster v. Steele, 75 Ill. 544; Wilcus v. Kling, 87 Ill. 107. By the terms of the contract for the construction of the building, Marino expressly waived any right to a mechanic's lien, and as a result, the sub-contractors could not enforce a lien on the premises. Rittenhouse Co. v. Warren Co., 264 Ill. 619; Cameron Co. v. Geseke, 251 Ill. 402.

The uncontradicted evidence shows that Monaco was indebted to Marino, and that subsequent to the service of process he paid Marino about \$1500. This was subject to garnishment, and the court therefore erred in discharging the garnishee Monaco. Wilcus v. Kling, supra.

The judgment of the Municipal Court, so far as the garnishee Nicola Monaco is concerned, must be reversed, but

as all the facts are before this court, no reason exists for remanding the cause. A judgment will therefore be entered in this court in favor of James L. Marino for use of Frank Surianello, and against the garnishee Nicola Monaco, for \$100.10.

JUDGMENT REVERSED AND JUDGMENT
IN THIS COURT.

THE UNIVERSITY OF CHICAGO PRESS

379 - 21776

AMERICAN HARD RUBBER CO.,
a corporation,

Defendant in Error,

vs.

THAD H. HOWE,

Plaintiff in Error.

203 I.A. 353

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion
of the court.

The American Hard Rubber Co., a corporation,
brought suit against Thad H. Howe, to recover \$2000 with
interest thereon and \$10.50 court costs. To plaintiff's
statement of claim defendant filed an affidavit of merits,
which on motion of the plaintiff, was stricken from the
files, and the defendant ordered to file an amended affi-
davit of merits within five days. After the expiration of
the five days, defendant elected to stand by its affidavit
of merits and thereupon was defaulted. Evidence was heard
on the question of damages and the court entered judgment
in favor of the plaintiff for \$2000, to reverse which the
defendant prosecutes this writ of error.

The two questions to be decided are (1) the suffi-
ciency of plaintiff's statement of claim and (2) the suffi-
ciency of defendant's affidavit of merits.

The statement of claim alleged in substance that
the Swiss American Vaporator Co. purchased certain merchan-
dise from the plaintiff; that payment of the same was guaran-
teed by the defendant; that thereupon plaintiff delivered
the merchandise "to the defendant"; that the price agreed

2008 A. 1. 228

AMERICAN TRADING COMPANY, INC.

Plaintiff in Error,

vs.

JOHN L. HUNT

Defendant in Error.

CHICAGO, ILL.

Filed for Record

Plaintiff in Error.

of the court.

of the court.

The American Trading Company, Inc., a corporation,
 brought suit against John L. Hunt, to recover \$2000 with
 interest thereon and \$10.00 court costs. The plaintiff's
 statement of claim is as follows: The plaintiff is a
 corporation which on or about the 1st day of May, 1934,
 filed with the defendant a certain order for the sale of
 five shares of stock in the defendant's corporation. The
 order was signed by the plaintiff and was in the following
 tenor: "I, John L. Hunt, do hereby order the sale of
 five shares of stock in the defendant's corporation to
 the plaintiff for the sum of \$2000.00. Witness my hand
 and seal this 1st day of May, 1934." The defendant
 refused to comply with the order and the plaintiff
 thereupon brought this suit to recover the amount of
 the order and costs.

The two questions to be decided are (1) whether
 the statement of claim is sufficient to state a
 claim for recovery and (2) whether the defendant
 is liable for the amount of the order.

The statement of claim is sufficient to state a
 claim for recovery because it sets forth the facts
 of the case and the amount of the order. The
 defendant is liable for the amount of the order
 because he refused to comply with the order of the
 plaintiff. The plaintiff is entitled to recover the
 amount of the order and costs.

upon was \$3025 and a payment of \$1025 was made by the Swiss American Vaporator Co., leaving a balance of \$2000; that afterwards plaintiff instituted suit in the Municipal Court of Chicago and obtained a judgment against the Swiss American Vaporator Co. for \$1040, which amount was admitted to be due by the Swiss American Vaporator Co.; that the balance of plaintiff's claim amounting to \$960 was contested and not included in the judgment; that execution was issued on the judgment of \$1040 and returned "no part satisfied;" that repeated demands for payment had been made by the plaintiff upon the Swiss American Vaporator Co., which were refused; that said company was insolvent, and that any delay in reducing the balance of plaintiff's claim of \$960 to judgment would endanger plaintiff's claim against the defendant.

The defendant in his affidavit of merits swears that he has a good defense to the whole of plaintiff's demand and that the nature of his defense is as follows:

"That said plaintiff did not furnish and deliver the goods, wares and merchandise mentioned in said order and guarantees; that there was no balance of \$2000.00 due on December 3rd, 1914; that Swiss American Vaporator Co. has paid \$100.00 on account of said judgment of \$1040 mentioned in said statement of claim; that defendant is not liable for costs and interest on said claim; that plaintiff on to-wit March 1915 in consideration of A. H. Freeman agreeing to pay \$100.00 on said judgment and \$100.00 each and every week thereafter until same was paid, agreed to extend the time of payment of plaintiff's claim so that same should be paid \$100.00 cash on to-wit March 1, 1915 and \$100.00 each and every week thereafter, and that A. H. Freeman paid said plaintiff \$100.00 on account of said agreement and agreed to pay plaintiff \$100.00 each and every week thereafter."

Defendant contends that the judgment set up in plaintiff's statement of claim against the Swiss American

[illegible]

That he was a good friend to the whole of the world.

1. The first of these is the fact that the
2. second of these is the fact that the
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Vaporator Co. is not conclusive against him, "but can only be introduced against him as evidence of its own existence, and not as evidence of any of the facts upon which its recovery rests;" and further that the statement of claim does not allege that the judgment was obtained for the purchase price of the goods, the payment of which was guaranteed by the defendant. Assuming that defendant's contention in this regard is correct, it has no application to the matter under consideration, as there is no contention that the allegation in reference to the judgment is conclusive against the defendant.

The defendant further contends that the statement of claim does not set up a cause of action. Defendant admits that the guaranties set forth in the statement of claim would bind him, if there was an allegation that the merchandise mentioned in the guaranties was delivered by the plaintiff to the Swiss American Vaporator Co. The statement of claim does not make such allegation, but alleges delivery was made "to the defendant". We are of the opinion, however, that this was merely a clerical error, for it is apparent from an examination of the entire statement of claim that the goods were delivered to the Swiss American Vaporator Co. and not to the defendant, the guarantor, and this too was the understanding of the defendant when he filed his affidavit of merits. The contention now urged was in no way brought to the attention of the trial court and in fact seems to be an afterthought, and is without merit. When the context affords the means of correction, the proper word will be deemed substituted. Ball v. The Tribune Co., 123 Ill. App. 235.

The defendant next contends that his affidavit of merits was sufficient and should not have been stricken; first, because it denies that the merchandise covered by defendant's guaranty was not delivered and this constitutes a complete defense. It is a sufficient answer to this contention to say that the affidavit of merits contains other allegations which were improper, as hereinafter stated, and therefore the contention made is untenable. The second reason urged why the affidavit of merits was sufficient is that payment of \$100 had been made on account of the judgment and that in consideration of Freeman's agreeing to pay \$100 per week on said judgment, the time of payment was extended, and that under the law, where the time of payment is extended without the guarantor's consent he is discharged. It is undoubtedly the settled law that where an extension of time is given the principal for the payment of money by a valid and binding agreement without the guarantor's consent, the latter is discharged. Loeff v. Taussy, 102 Ill. App. 398. But the difficulty with defendant's contention is that there is no allegation that the time of payment was extended without his consent. For aught that appears from the affidavit of merits, the time of payment may have been extended with his consent, and under the rule that a pleading is to be taken most strongly against the pleader, the court unquestionably did not err in striking the affidavit of merits from the files.

The affidavit of merits was not severable and the court was not called upon to point out the particular parts of it that were insufficient, but was warranted in holding it insufficient in its entirety.

Complaint is also made by the defendant that he is not liable for costs incurred in the suit against his principal nor for interest accruing on the judgment.

The defendant next contends that the affidavit of

merits was sufficient and should not have been attacked;

first, because it denies that the responsibilities covered by

defendant's guaranty was not delivered and this constitutes

a complete defense. It is a sufficient answer to this con-

tention to say that the affidavit of merits contains other

allegations which were proper, as pointed out above, and

therefore the contention made is untenable. The second

reason urged why the affidavit of merits was sufficient is

that payment of \$100 had been made on account of the loan-

ment and that in consideration of defendant's agreement to pay

\$100 per week on said judgment, the loan of money was ex-

tended, and that under the law, where the time of payment

is extended without the guarantor's consent as is demanded,

it is undeniably the well-settled law that there is an extension

of time is given the principal for the payment of money by

a valid and binding agreement without the guarantor's con-

sent, the latter is discharged. Boyle v. Lantry, 100 Ill.

App. 393. But the difficulty with this line of contention

is that there is no allegation that the time of payment was

extended without the consent. Nor could that appear from

the affidavit of merits, the time of payment may have been

extended with the consent, and under the law that a guar-

anty is so taken most strongly against the guarantor, the

court undeniably did not in extending the affidavit

of merits find the time.

The affidavit of merits was not sufficient and

the court was not misled upon its review of the affidavit

parts of it that were insufficient, and was warranted in

holding its conclusion in the affirmative.

Conclusion is also made in the affidavit that the

is not liable for costs incurred in the suit, and that the

principal not for interest according to the judgment.

Neither of these items was included in the judgment in the case at bar, and the point is therefore without merit.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Neither of these items was included in the judgment in the
case at bar, and the point is therefore without merit.

Finding no reversible error in the record, the
judgment of the Municipal Court of Chicago is affirmed.

ATTEST.

93 - 21066

BRIDGET O'BRIEN,

Defendant in Error,

vs.

PETER P. SALERNO,

Plaintiff in Error.)

2452
203 I.A. 356

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error seeks the reversal of a judgment against him in favor of defendant in error for \$600.00, entered by the court on a finding in a case tried by the court without a jury. In her statement of claim, defendant in error alleged that it was for damages for personal injuries caused by the plaintiff in error's carelessly and negligently leaving a horse hitched to a wagon, untied in the street. In his affidavit of defense, plaintiff in error stated that the horse did not belong to him, and therefore he could not be held liable.

On July 7, 1914, the cause was submitted to the court without a jury, and a finding entered in favor of defendant in error, and assessing her damages at \$1,000. A motion for a new trial was entered and continued from time to time until October 10th, when an order was entered allowing a new trial, and reciting that the cause came on in regular course for trial before the court without a jury, and that "the court finds the defendant guilty * * * and assesses the plaintiff's damages at the sum of \$600.00."

2081.A.358

BRIDGES, JAMES

Defendant in Error

vs.

THE PEOPLE

vs.

THE PEOPLE

THE PEOPLE

Defendant in Error

THE PEOPLE

THE PEOPLE

The defendant is charged with the crime of murder in the first degree. The charge is based upon the fact that the defendant, on or about the 1st day of January, 1935, at Chicago, Illinois, unlawfully and maliciously caused the death of one John Doe, a human being, with intent to kill.

The defendant is charged with the crime of murder in the second degree. The charge is based upon the fact that the defendant, on or about the 1st day of January, 1935, at Chicago, Illinois, unlawfully and maliciously caused the death of one John Doe, a human being, without intent to kill.

The defendant is charged with the crime of murder in the third degree. The charge is based upon the fact that the defendant, on or about the 1st day of January, 1935, at Chicago, Illinois, unlawfully and maliciously caused the death of one John Doe, a human being, without intent to kill and without premeditation.

On July 7, 1935, the defendant was indicted by the grand jury of Cook County, Illinois, for the crime of murder in the first degree. The indictment was returned against the defendant for the crime of murder in the first degree, and the defendant was arraigned on the indictment.

A motion was made by the defendant for a new trial, and the motion was denied by the court. The trial was held on July 15, 1935, and the defendant was found guilty of murder in the first degree. The court sentenced the defendant to the State's Prison for a term of years.

The defendant appeals from the verdict and sentence of the court. The defendant claims that the trial was unfair and that the evidence was insufficient to sustain the verdict. The defendant also claims that the court erred in denying the motion for a new trial.

No brief was filed on behalf of the defendant in error. Counsel for plaintiff in error contend that the evidence was totally insufficient to warrant a finding, and that improper evidence was received.

As to the first contention, it seems sufficient to say that the bill of exceptions recites that "the foregoing contains as much evidence as recollected by counsel and court and introduced on the trial of this cause;" as it does not purport to contain all of the evidence, the law conclusively presumes that there was evidence received sufficient to sustain the finding.

In answer to counsels' second point, it may be said that where, as in this case, the cause is tried by the court without a jury, the judgment will not be reversed on account of the court's improper admission of evidence if there is sufficient competent evidence to sustain the finding, since the court is presumed to have disregarded the evidence improperly admitted, and to have entered his finding upon the competent evidence before him. (Palmer v. Meriden Britannica Co., 188 Ill. 508.) In the absence of the bill of exceptions purporting to recite all the evidence, sufficient competent evidence to justify the finding of the court is necessarily presumed. In these circumstances, the judgment of the Municipal Court must be affirmed.

AFFIRMED.

226 - 21204

JULIA FARRELL,

Defendant in Error,

vs.

JAMES W. STAFFORD,

Plaintiff in Error.)

203 I.A. 357

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The defendant in error, who will be referred to as the plaintiff, recovered a judgment against the plaintiff in error, who will be referred to as the defendant, for \$153.50, in a suit brought for the conversion of certain goods belonging to the plaintiff. The defendant seeks to have this judgment set aside on the following grounds; . that no conversion was proved; that vindictive damages were allowed; that the amount of damages was not proved by competent evidence; that defendant was not credited with the amount claimed for set off upon which plaintiff was defaulted and that defendant's tender of the goods should have been considered in mitigation of the damages.

The evidence disclosed that the plaintiff, while a lodger at the defendant's hotel, became indebted to him to the extent of \$26.50; as she was apparently unable to pay the bill, she secured the release of her personal effects by leaving the box and barrel containing cut glass and silverware with the defendant under the following agreement:

"Chicago, Jany. 11, 1910.

"I hereby agree to pay my bill at Queen Hotel amounting to \$26.50 to be paid in 90 days from date and I leave as security for same one barrel and box out glass and silverware and I agree that if I do not pay the bill within 90 days from date the Hotel can sell said goods without further notice to pay said bill.

Julia Farrell."

Four years afterwards, the defendant advertised the goods for sale at public auction, apparently pursuing the course provided for in the inn-keepers act. The testimony on his behalf is to the effect that at this auction the goods were sold to one Isaac Smith for \$5.00, but that Smith never took possession of them. The auctioneer, who was defendant's nephew, said that as Smith was not a married man, he told the witness that he could take care of them, and if at any time the bill was paid, he could get his money, by this he apparently meant the \$5.00 which he had paid. He also testified that the barrel was unopened at the time it was sold and there is no evidence that anything was said to Smith about its contents. Defendant testified that plaintiff told him that the barrel was worth between \$25.00 and \$26.00 and could be sold for that.

We do not think it is necessary to decide whether the inn-keepers act would, under ordinary circumstances, apply to the goods in question, since they were specially pledged to the defendant, and under that pledge it was within his rights to sell them at any time after the expiration of ninety days, and without notice to the plaintiff. Upon the question of liability, then, the only matter to be decided was whether there had been a bona fide sale by the defendant under the terms of the pledge, and we are of the opinion that the judge, who tried the case without a jury, was amply justified ^{in finding} that there had been no such

Will.
self said; goods without further notice to pay said
day the bill within 90 days for the hotel and
out glass and silverware and I agree that if I do not
pay, I leave no security for same and further and have
nothing to do in 90 days from date
* I hereby agree to pay all of above Hotel
bill.
Witness, 12th, 11, 1911.

15. INTERVIEW 8:15 AM.

11-10-44

[illegible]

sale. In the first place, it appears that there is abundant evidence to justify the court in finding that the auction sale relied upon was a mere formality, but we are also of the opinion that where a pledge recites that a barrel contains cut glass and silverware,- and the defendant by his own testimony admits that he was told at the time it was pledged that it was worth between \$25.00 and \$50.00,- and the defendant is given, by the terms of the pledge, full power to sell the "goods", which necessarily includes the power to open the barrel in which they are contained. A pledgee is not justified in selling the barrel and its contents at auction without opening it or disclosing what its contents are. Such a case is clearly distinguishable from a sale under the inn-keepers^{lien}/act, where the sole authority of the inn-keeper is the statute, which, it might be contended, does not give, expressly or impliedly, the right to open trunks, boxes, or barrels in which goods are contained.

So far as the values are concerned, the evidence of plaintiff was that the goods were worth several times the amount of the judgment, and that testimony, taken together with the testimony of the expert offered on behalf of the defendant, amply sustains the finding of the court. The goods had been long in plaintiff's possession; they were such as are ordinarily and customarily used in the household, and it is impossible for us to say that plaintiff's evidence in regard to their value was incompetent.

Defendant contends that as plaintiff was in default, she had no right to maintain an action in trover unless she kept her tender good by paying the amount of

sale. In the first place, it appears that the defendant
did not intend to justify the court in finding that the
auction sale held upon was a sale for retail, but was
also for the reason that there is evidence that a
barril containing out dress and liverware, and the de-
fendant by his own testimony on the fact he was told a con-
siderable time it was figured that it was worth between \$10.00 and
\$25.00, and the defendant is given, by the terms of the
pledge, full power to sell the "goods", which necessarily
includes the power to open the barril in which said goods
were contained. A pledgee is not restricted to selling the
barril and the contents as a whole without opening it or
discussing what the contents are. There is no difficulty
discernible from a sale under the pledge, and
where the sale is made of the contents of the barril, it is a sale,
which, it might be contended, even if the goods are
immediately, the right to open barrels, boxes, or casks
in which goods are contained.

As for the value of the goods, the value of the goods
of material value, the value of the goods, the value of the goods,
the amount of the payment, the value of the goods, the value of the goods,
together with the testimony of the expert of the value of the goods,
half of the defendant, largely to the value of the goods,
court. The goods had been sold in the first place, and
they were sold at a price, and the value of the goods, and
the household, and it is impossible to say that the
plaintiff's evidence is in fact to the value of the goods,
competent.

But what evidence is there that the value of the goods
is, and it is to be said that the value of the goods
which she kept for her own use, the value of the goods

defendant's lien in court, and cites Blain v. Foster, 33 Ill. App. 297. That case is clearly not in point, for here under defendant's own evidence, it is clear that a conversion of the goods had actually taken place, and the case, therefore, has no analogy to a case where goods are merely retained by the mortgagee.

Defendant further claims that the finding includes punitive damages, but there is nothing in the form of the finding or the amount of the damages assessed which indicates that punitive damages were actually included. As the evidence was ample to sustain the finding as one based on actual damages, we cannot, in the absence of any special finding on that point, assume that punitive damages were included. Nor can we infer from the inclusion of the words, "maliciously, wilfully and intentionally, and with intent to injure and defraud the plaintiff," in the court's general finding, that punitive damages must have been included, since the form of finding is appropriate to an ordinary case in trover, and is very similar to the language used in declarations in that form of action.

So far as defendant's claim of set off is concerned, it must be assumed, in the absence of any contrary showing, that plaintiff was duly credited with the amount claimed. Defendant's claim that the tender of the goods in open court should have been considered a mitigation of damages, cannot be sustained, for while a defendant has the right to tender in open court goods which have been converted, and have that tender considered in mitigation of damages, no such tender was made in this case, but, on the

the morning.

has no analogy to a case where goods are really retained by

the goods had actually been placed, and it is clear, therefore,

defendant's own evidence, it is clear that defendant's

Apr. 287. That case is clearly not in point, for there under

defendant's lies in court, and also Martin v. Weir, 33 Ill.

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate political organization or a subversive group. The Commission is therefore unable to determine whether the CLPS is a legitimate political organization or a subversive group.

contrary, the goods were brought into court and an offer made to surrender them as a full settlement of plaintiff's claim; an offer which plaintiff was not bound in any way to accept; had they been offered in mitigation of damages, a different question would arise here.

We are, therefore, of the opinion that there is nothing in this record showing error in the trial of this case or that the finding and judgment were the result of prejudice, as claimed. The judgment of the Municipal court is affirmed.

AFFIRMED.

concerning the goods were brought into the country and the other
made to surrender them as a full satisfaction of plaintiff's
claim; and after which plaintiff was not bound in any way
to accept; but that he was obliged to accept of the same,
a bill of exchange being given to him.

We are, therefore, of the opinion that there is
nothing in the record which would entitle the defendant to this
sum as that the finding and judgment were the result of
prejudice, as alleged. The judgment of the court is
affirmed.

ATTEST.

NATIONAL SURETY COMPANY,
A Corporation,

Plaintiff in Error,

vs.

GOLDENBERG FURNITURE COMPANY,
A Corporation,

Defendant in Error.

203 I.A. 362

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of
the court.

The plaintiff in error brought suit against defendant in error to recover under a contract by the terms of which defendant in error was to indemnify it for any moneys paid to the Peoples Gas Light & Coke Company under the terms of a bond which it signed as surety. The facts briefly stated are that the defendant in error was made a collector for the Peoples Gas Light & Coke Company, and under its contract with the company it was bound to receive cash payments due the company and to account for, and turn over to the company each day, all moneys so collected; to secure the performance of this agreement, the bond in question was executed, and to secure the defendant in error against loss, the plaintiff in error agreed to indemnify it.

From the agreed statement of facts, it appears that on December 5th, 1913, the defendant in error received for the Gas Company the sum of \$81.18, and paid the same to the Gas Company on December 5th; that on Saturday, December 6th, it received for said Gas Company the sum of \$538.26, and placed the same in the cash drawer in the inner safe in its vault in its store; that at the

2081A.365

MAILING LABEL, 1915
A CORPORATION

INCORPORATED IN NEW YORK

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TO HOLD THE SAME AS A TRUST, THE TRUSTEES OF

THE TRUST.

The plaintiff in error and the defendant

defendant in error to recover under the contract of the

terms of which defendant in error was to deliver to the

for any amount paid to the plaintiff in error.

Company under the terms of the contract of the

contract. The plaintiff in error and the defendant

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terms of which defendant in error was to deliver to the

for any amount paid to the plaintiff in error.

Company under the terms of the contract of the

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in error to recover under the contract of the

terms of which defendant in error was to deliver to the

for any amount paid to the plaintiff in error.

from the proceeds of the sale of the same.

that on or about the 1st day of January, 1915, the

defendant in error was company of the plaintiff in error.

the sum of \$100,000 was paid to the plaintiff in error.

whereby, defendant in error, its agents and employees

the sum of \$100,000, and placed the same in the

in the name of the plaintiff in error; and on the

close of the day, after the amount of receipts had been determined, the defendant in error mailed to the Gas Company its check for \$538.26; that after the close of business on the night of December 6th, 1913, and before the opening of business at the defendant in error's store, Monday, December 8th, "some person or persons unknown to the defendant, and without fault or negligence on its part, broke into its premises, blew open the vault door and the inner vault door, and broke open the safe in said vault and the cash drawer in the safe, and stole therefrom the identical funds received by said defendant December 6th, 1913, being the collections made for said Gas Company, and also other money belonging to the defendant." The defendant in error immediately stopped payment on the check, and thereafter, on January 8, 1914, the plaintiff in error, in good faith, believing itself to be liable therefor, paid the Gas Company the sum of \$538.24 and demanded reimbursement, which was refused.

The collections were made by the defendant in error without compensation. We do not think that under the terms of the indemnifying contract the plaintiff in error is entitled to indemnify unless the defendant in error was liable to the Gas Company. It was expressly stipulated that the funds were stolen without fault and negligence on the part of the defendant in error, and it is therefore evident that the defendant in error was not liable to the Gas Company if it held the funds collected as bailee or trustee, and that it is liable if, upon the collection of the funds, the relation of debtor and creditor was established. It is very obvious that in the ordinary case, one who collects money for another does not

close of the day, and a number of the people had been
detained, the defendant had been taken to the law
its name for \$250.00; that the defendant had been
the night of December 21st, 1911, and before the hearing of
business of the court in the afternoon, the defendant
\$250.00, "some person or persons who were to be paid
with the result of the trial, the defendant had been
prevented, after the result of the trial had been
the person upon the trial, and the result of the trial
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become his debtor, but becomes the custodian or trustee of the funds so collected. Each case, of course, must depend upon the intention of the parties. The language of the defendant in error's undertaking in the present case, is very explicit. It "agrees to account for and turn over to the Company each day all money so collected during the preceding twenty-four hours, together with all coupons, which shall in every case be detached from said gas bills for that purpose." Here, certainly, there was no intention that the money collected should become the money of the defendant in error and to accept it as a debtor; on the contrary, it was required to turn it over immediately. The fact that it might, in turning over the money, use the commercial means ordinarily used, does not alter the relations of the parties. A trustee, for instance, may turn over funds to the cestui by the use of his own personal check, and when the money is received in due course by the latter, the trust fund in the hands of the former is relieved of its trust character. It seems very clear that in the present case, the moneys received from gas bills, when placed in the vault, continued to be the funds of the Gas Company, even after the check had been mailed, and that had the defendant in error gone into bankruptcy after collecting the funds, the Gas Company would not have stood in the position of a creditor, but would have been entitled to recover the moneys collected, and would, moreover, have been entitled to follow them even if they had not been deposited in a bank to the general credit of the defendant in error. (Ferris v. VanVechten, 73 N.Y. 113; Blair v. Hill, 50 N.Y. App. Div. 33, affirmed 165 N.Y. 672.)

It necessarily follows from this that as the money remaining in the vault was still the property of the Gas Company, and was stolen without the fault of the defendant in error, the latter was relieved of all liability to the Gas Company, and that it therefore properly stopped payment on a check which had been drawn for the purpose of transferring that amount, since by the theft it had been discharged from its liability to account for and turn over the fund. Geist v. Pollock, 58 Ill. App. 429, the only case cited by counsel for plaintiff in error, is clearly not in point, since the testimony of the depositor in that case was that when he left the money with his employer, he told him he probably would not want it for some eight months, and it was very obviously the intention of the parties that the relation of debtor and creditor should be established.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

It necessarily follows from this that as the money remaining in the vault was still the property of the bank, and was stolen without the bank's consent, the defendant in error, the bank, was relieved of all liability to the bank, and that it therefore properly stopped payment of a check which had been drawn for the purpose of transferring that amount, since by the time it had been dishonored from its liability to account for and turn over the funds. Bank v. City of New York, 33 Ill. App. 420, the only case cited by counsel for plaintiff in error, is clearly not in point, since the testimony of the depositor in that case was that when he left the money with the employer, he told him he probably would not want it for some of his months, and it was very obviously the intention of the parties that the relation of debtor and creditor should be established. The judgment of the court should be affirmed.

AFFIRMED.

209 - 21603.

203 I.A. 364

EUGENE A. PERIFFER,
Defendant in Error,

} ERROR TO

vs.

} MUNICIPAL COURT

THE HUDSON MANUFACTURING CO.,
Plaintiff in Error. }

} OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error seeks the reversal of a judgment against it for \$601.03, entered in favor of defendant in error. For greater convenience, the parties will be designated as plaintiff and defendant.

Plaintiff was employed by the defendant as a traveling salesman for some seven or eight years, originally at a salary of \$60.00 or \$70.00 a month, and during the last few years, at a salary of \$175.00 a month. He left the employ of the defendant February 22, 1913, and the evidence of the defendant, as well as that of the plaintiff, discloses that the defendant was indebted to him in the amount for which judgment was rendered, unless defendant was entitled to charge plaintiff for certain absences from duty. These items were as follows: April 20th to 30th, ten days, May 1st to May 10th, ten days, July 29th to August 12th, fourteen days, October 30th to November 8th, November 16th to November 26th, and December 6th to December 21st. All of these items were in the year 1911; the first was twenty-two months, and the last about fourteen months before plaintiff left defendant's employ. The facts in regard to the plaintiff's absence from the road were known to the defendant at all times, but no right to make a deduction from plaintiff's salary on that account was made or suggested until after he had left its employ. On May 9th, 1911, with full knowledge of plaintiff's movements prior to that time, defendant sent plaintiff a check for \$191.25, which was the exact amount due him without

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making any deductions. Also, on August 10th, 1911, with similar information in regard to plaintiff's services, it sent him a check for \$105.70, which was the amount then due without making any deduction for alleged absence from the road.

Plaintiff testified that from April 23d to April 30th, he was in Chicago waiting for a new route; that from May 2d to 5d, he took orders in Chicago; May 6th, in Lake Forest, Rock Island and Libertyville; that he was working in those towns from May 1st to May 10th; that August 2d to 7th, he took orders at Evanston, and August 12th, at Rockefeller; that from November 18th to November 26th, which included the date when his child was born, he was at home with the consent of the president of the company; that from December 6th, when his child died, to December 31st, he was also at home with the consent of the president of the company, and after talking with him about it; this period also included the holidays. During the entire time he was employed, his account was not debited with these items, and no suggestion was ever made that it was intended that it should be. There is, moreover, an entire absence of any testimony from which it can be inferred that the company intended at any time to make such a debit. The evidence so far rehearsed was sufficient to sustain, if it did not compel, a finding that it was the intention of the parties that the plaintiff should remain at home without any deduction in his salary. Such arrangements are not at all uncommon; vacations are allowed quite as a matter of course, and absences are frequently allowed to old employes without deducting from the salary, in instances similar to those shown in the case at bar. It is not always advantageous to the employer to have the expense of an employe on the road at every season of the year, and without regard to his fitness

for work. But we think that the intention of the parties is put beyond question when there is added the further evidence that on November, 1912, defendant sent plaintiff a statement covering his account from January 2nd, 1912, to November 15th, 1912, showing a balance due plaintiff of \$306.97, which was the exact amount due, and without any deduction for any of the absences now relied upon. To this must be added the fact that it was not until after February 22nd, 1913, when plaintiff left defendant's employ, that any claim was made on account of these absences, and that then, for the first time, the president of the company directed an employee to make up a statement from the data which had always been in the company's possession, and to direct the bookkeeper to enter the items on the company's journal and ledger. In short, the absences, of which the company had full knowledge, were in 1911; full and exact payments without deductions were made after some of them had occurred, and nearly a year after the last absence occurred, a statement of the amount due the plaintiff was rendered by the defendant, in which no deduction was suggested.

We are, therefore, of the opinion that the evidence is not only sufficient to sustain the finding of the jury, but that it was not open to the jury to reach any other conclusion. We are further of the opinion that the grounds for reversal presented in this case are so clearly without merit, that we are warranted in concluding that the writ of error was sued out for the purpose of delay. In such circumstances, this court is, under the decision of our Supreme Court in Baker v. Prebis, 185 Ill. 191, entitled to assess statutory damages. The judgment of the Municipal Court will be

affirmed, and a judgment entered against the plaintiff in error and in favor of the defendant in error for the sum of \$60.00 statutory damages, in addition to the costs to be taxed, and the defendant in error will have execution therefor.

AFFIRMED.

265 - 21660.

LOUIS WALDSCHMIDT, JESSE
W. RULE, and SAMUEL B. BROWN,
co-partners, doing business as
DUNBAR MILL & LUMBER CO.,
Defendants in Error,

vs.

THE MARSH & BINGHAM CO.,
Plaintiff in Error.

203 T. A. 365
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error, hereinafter referred to as the defendant, seeks the reversal of a judgment against it in favor of the defendants in error, who are hereinafter referred to as plaintiffs. The facts briefly stated are that the plaintiffs filed suit to recover a balance alleged to be due for lumber shipped defendant under a written contract which called for a much larger shipment, and defendant filed a set off claiming damages at the rate of \$2.00 a thousand feet, on account of plaintiffs' failure to ship the balance of the lumber.

It would serve no useful purpose to rehearse the evidence, and it is sufficient, we believe, briefly to state that plaintiffs did not, in our opinion, make deliveries of the lumber as rapidly as they undertook to do under the terms of their contract, and that this failure constituted a breach of a condition of the contract. On the other hand, plaintiffs contend that the defendant improperly rejected a large part of the lumber shipped by it in accordance with the terms of the contract, and refused to pay for it, and that this constituted a breach of the contract which entitled them to refuse to go on with it, which they did, and on that ground. To this, defendant replied that if its rejection of a portion of the lumber was a breach at all, which it denied, plaintiffs' breach of the contract in failing to make timely shipments, as it occurred first, enables it to recover therefor.

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1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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There is no doubt, of course, that if time was of the essence of this contract, which it may well be contended that it was, defendant would have the right to consider plaintiffs' failure to make timely shipments a sufficient breach of the contract to enable it to treat the contract as at an end, buy lumber in the market, and recover its loss. No such course was, however, followed; on the contrary, the defendant, after plaintiffs' alleged failure to make deliveries, still insisted that the plaintiffs proceed with their contract, which they declined to do on the ground that defendant had already broken the contract by refusing large portions of the shipments made. We are, therefore, of the opinion that if plaintiffs were guilty of a breach of the condition of the contract which required timely shipments, and that that entitled the defendant to treat the contract as at an end, defendant waived that right by insisting that plaintiffs proceed, and that plaintiffs' failure in the matter of making timely shipments, if they did fail, did not, in such circumstances, disable them, if the rejection of the lumber shipped was a breach of the contract which would otherwise entitle them to do so. The matter was properly submitted to the jury, and it, by its verdict, found that defendant was guilty of a breach of the contract which entitled plaintiffs to refuse to proceed with the shipments. It must be noted that defendant's claim of set off was not on account of plaintiffs' failure to make timely shipments, but on account of their refusal to proceed with the remainder of the contract, and the jury, by its verdict, has found that plaintiffs were entitled to refuse to do so. Had defendant presented a set off based wholly upon a failure to make timely shipments, a different question would be presented here. There was no conflict in the testimony as to the fact that when plaintiffs refused to proceed with their contract on the ground of the unjust rejection of the defendant of a portion of the

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lumber, defendant was at that time insisting on continued performance, and while there was conflict in the evidence as to whether defendant had improperly rejected portions of the shipments made, we are unable to say that the jury's conclusion in regard to this point may be contrary to the manifest weight of the evidence. In this view of the case, no question arises as to whether the contract was severable or entire, for if the defendant was guilty of a breach which entitled the plaintiffs to refuse to proceed, they were entitled to recover for the deliveries already made.

The court's charge to the jury, which was delivered orally, has been criticised by defendant, but upon a careful examination we are unable to say that it is open to criticism in any material particular. The fact that in one portion of the charge, the court said that if the jury believed from the evidence "that the defendant wrongfully and without just cause refused to accept the lumber," instead of a portion of the lumber, is not subject to criticism, since counsel for defendant themselves say there was no dispute between the parties in regard to the amount of lumber that was actually rejected. That portion of the charge, therefore, was in no way misleading. We think the criticism in regard to the portion of the charge which refers to the question of payment for the lumber shipped, is also without merit, since the court merely referred the jury to the contract, and told them that if the defendant refused to pay in accordance with the terms of the contract, then the plaintiffs were justified in refusing to make further shipments thereunder.

In view of these circumstances, the judgment of the Municipal Court is affirmed.

AFFIRMED.

114 - 21504

PERFECTION PULVERIZING MILLS,

A Corporation,

Plaintiff in Error,

vs.

GEORGE E. KEISER,

Defendant in Error.)

203 I.A. 383

ERROR TO

COUNTY COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Plaintiff in error, Perfection Pulverizing Mills, a corporation, (hereinafter designated plaintiff) brought suit against the defendant in error, George E. Keiser, (hereinafter designated defendant) on the common counts for the sum of \$113.51. The defendant pleaded the general issue and gave notice of a set off thereunder in the sum of \$681.13. The jury returned a verdict in favor of the defendant on his set off, assessing his damages at \$495.95, upon which the court entered judgment and the plaintiff thereupon sued out a writ of error to reverse said judgment to vacate and set aside the verdict of the jury and to assess the damages in favor of the plaintiff in the sum of \$113.51.

The plaintiff was in the sugar pulverizing business and did considerable work for the defendant; and its claim is for work done pulverizing various quantities of sugar which were sent to it for that purpose by the defendant. Plaintiff's claim for \$113.51 was practically admitted by all parties which leaves as the sole issue that which arises by reason of the notice of set off filed

288 A. 1309

RECEIVED THE UNIVERSITY OF CHICAGO
A. J. 1309

MINNESOTA

TO THE

STATE OF MINNESOTA

VS.

JOHN A. J. 1309

EDWARD J. J. 1309

IN SENATE

THE SENATE OF THE STATE OF MINNESOTA

REPORT

REPORT OF THE SENATE OF THE STATE OF MINNESOTA

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by the defendant.

The defendant on March 28, 1914, delivered to the plaintiff 50 barrels of sugar. The plaintiff held the same in original packages until a few days prior to April 4, 1914, at which time at least 44 out of the 50 barrels were dumped into various hoppers and bins and other parts of the machinery to be ground and turned out as powdered sugar. On April 4th a fire occurred in plaintiff's factory and the whole of the fifty barrels, with the exception of six barrels, about which there was some controversy, was destroyed by fire. No claim is made that the fire was caused by the negligence of the plaintiff.

It is claimed by the defendant that in July, 1913, an oral contract was made with the plaintiff, whereby the plaintiff agreed to grind and crush sugar for the defendant at certain fixed prices; that terms were agreed upon in regard to different kinds of sugar and the furnishing of barrels, etc; that the sugar was to be delivered by the defendant to the plaintiff's factory to be ground as, and when, defendant ordered it to be ground; that until an order to grind was given by the defendant, the sugar delivered to the plaintiff was to be left in the original packages at plaintiff's storehouse. The general substance of the oral contract was not denied by the plaintiff but the latter claims that there was not in the oral agreement the provision that the sugar was to be left in the original packages in plaintiff's possession until an order to grind was given to the defendant. It is admitted that the sugar was taken out of the original packages and placed in the hoppers and bins and other parts of the machinery for the purpose of having the same ground into powdered sugar without any special order

or direction from the defendant.

The chief question in the case was one of fact whether it was agreed between the plaintiff and defendant that upon the delivery of the sugar by defendant to plaintiff the latter should pulverize any of it without first receiving an order from the defendant. The case was tried before a jury and the matter submitted to them. The defendant, Keiser, testified that there was such a provision in the contract and his testimony was corroborated by the testimony of Andrew and their testimony was denied by Kay, the witness for the plaintiff. The record discloses a direct conflict, but, at the same time, we are unable to say that there is insufficient evidence to justify a verdict for the defendant. If it was understood and agreed to by both parties that this sugar should not be taken out of the original packages and pulverized only on definite orders from the defendant, then the plaintiff, when, just prior to the fire, it dumped the sugar into the hoppers and bins, without an order to do so from the defendant, was guilty of a breach of the contract, and we do not feel under the circumstances, considering the evidence as it is disclosed in the record, that it would be justifiable to disturb the verdict of the jury.

It is contended by the plaintiff that the damages were ^{un-}liquidated and grew out of a tort or a breach of contract, not connected with the contract sued upon and, therefore, cannot be made the subject of a set off. The defendant gave notice of a set off under the general issue.

of direction from the defendant.

The chief question in the case was one of

fact whether it was shown between the plaintiff and
defendant that upon the delivery of the sugar by defendant
to plaintiff the latter should have delivered any of it
without first receiving an order from the defendant.

The case was tried before a jury and the matter submitted
to them. The defendant, Kaiser, testified that there was

such a provision in the contract and his testimony was
corroborated by the testimony of Andrew and their testimony
was denied by the plaintiff.

The court also found a direct conflict, but, at the
time, we are unable to say what then is inconsistent
evidence is usually a verdict for the defendant. It is

was understood and agreed to by both parties that this sugar
should not be taken out of the original packages and only
various only on certain orders from the defendant, then

the plaintiff, when, just prior to the fire, it happened
the sugar into the hopper and then, without an order to
do so from the defendant, was guilty of a breach of the
contract, as we do not see how it could be otherwise,
viewing the evidence as it is. It is a breach of the contract,
and it is not possible to consider a verdict for the
defendant.

It is a question of fact whether the defendant
was negligent and, if so, whether it was a proximate
cause, not connected with the sugar in the hopper and
therefore, cannot be held the subject of the trial. The
defendant has a right to a new trial on general issues.

Under those circumstances it was only necessary to state clearly the nature of the claim of set off. The plaintiff's claim was for work done pulverizing sugar for the defendant running over a period of time beginning July, 1913, and pursuant to an oral contract and the defendant's claim was for damages for a breach of one of the terms of that contract. We are compelled to assume that the jury found that the contract provided that the plaintiff was entitled to pulverize the sugar only when it received orders from the defendant; and that the taking of the sugar out of its original packages and putting it in the bins without an order from the defendant was a violation of the terms of the contract and the proximate cause of the loss. From that it follows, therefore, that the plaintiff having sued upon the contract and the defendant having claimed damages for a breach of the same contract, they may be allowed even though unliquidated. Kaskaskia Bridge Co. v. Shannon, 1 Gilman 15; Edwards v. Todd, 1 Scan. 462; South Chicago City Ry. Co. v. Workman, 64 Ill. App. 383; Scudder-Gale Grocer Co. v. Russell, 65 Ill. App. 281.

It is contended by the plaintiff that no demand was made for a return of the sugar. If a demand were necessary in such a case, the testimony of Keiser is sufficient; but where the destruction of the res is admitted by both sides and the theory of the case and the whole trial is based upon the assumption of its loss, a demand, which would be a completely useless act, is unnecessary.

It is contended further by the plaintiff that Keiser, the agent, had no right to make a claim of set off in his own name. It was admitted that Keiser was the duly

Under these circumstances it is highly probable that the following information is correct:

authorized agent of B. H. Howell Sons and Company at all times between March 3, 1914 and April, 1914, and we are of the opinion that as the undisclosed agent he had as much right to claim a set off as his principals. Of course the sequel follows, that, having recovered, it then becomes res adjudicata even as to his principals.

Complaint is made by the plaintiff in regard to instruction number five which was given at the request of the defendant. The cases seem to support either theory, that is, damages as the result of negligence arising by reason of a breach of the contract, or damages as the result of a breach of contract. The words "wilful breach" made the instruction somewhat favorable to the plaintiff. The plaintiff complains of the refusal to give instructions 19, 23, 26 and 27. The cause of action in the Municipal court was not between the same parties; the real defendants in that suit were Kay and Lewis and not the plaintiff herein; and the trial judge was therefore justified in refusing the proffered instructions. We have examined the other objections made by the plaintiff to certain instructions which were given, and do not find in view of the evidence any that is unsound.

Finding no material error in the record, the judgment is affirmed.

AFFIRMED.

authorized agent of W. H. Howell from and on behalf of the
times between March 5, 1914 and April, 1914, and was
of the opinion that the authorized agent had had no
much right to claim a set off as his principal. Of course
the agent follows, that, having recovered, it was because
the defendant even as to its principals.

Conclusion is made by the plaintiff in regard
to instructions number five which was given at the request
of the defendant. The cases seem to support either theory,
that is, damages as the result of negligence arising by
reason of a breach of the contract, or damages on the re-
sult of a breach of contract. The words "willful breach"
mean the intention to commit a breach of the plaintiff.
The plaintiff complains of the refusal to give instructions
three 12, 13, 14 and 15. The court of action in the
Municipal court was not before the same Justice; the
real defendant in that suit was not before and the
plaintiff being, and the trial judge was to state facts
and in relation to the plaintiff's instructions. He there-
fore examined the evidence and the plaintiff to
certain instructions which were given, and he did find
in view of the evidence that he was wrong.

Finding no material error in the record, the

judgment is affirmed.

W. H. Howell.

178 - 21571

WILLIAM & VASHTI COLLEGE,
a corporation, for use
of Robert L. Watson,

Defendant in Error,

vs.

JEFFERSON D. SHATFORD,

Plaintiff in Error.

203 I.A. 390

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

William & Vashti College, a corporation, for
the use of Robert L. Watson, the defendant in error,
(hereinafter designated plaintiff) brought suit in the
Municipal Court against Jefferson D. Shatford, plaintiff
in error (hereinafter designated defendant) to recover
the sum of \$303.35 due the plaintiff from the defendant
for principal and interest on an account stated; and for
board, lodging, tuition and school books furnished to
J. Eric Shatford, the minor son of the defendant, at the
latter's request and upon his promise to pay the same,
being the sum of \$270 for board, lodging and tuition;
\$16.50 for school books and \$26.85 for interest.

The defense set up was that the son of the
defendant was not a minor at the time when the board,
lodging, tuition and school books were furnished to him;
that a college education is not a necessity; that there
was no account stated or contract or promise made by the
defendant to pay for such board, lodging, tuition or
school books.

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Division of Labor
of the
of Robert L. Taylor

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The case was tried without a jury and the trial judge found the issues for the plaintiff and against the defendant and entered judgment for the sum of \$286.50 which was the amount claimed by plaintiff to be due for board, lodging, tuition and school books, without interest. The chief question in the case is whether or not the defendant is liable for certain charges made against his son for board, lodging and tuition for the college year which began in the fall of 1910 and ended in the summer of 1911.

J. Eric Shatford, the son, first began attending the college in the fall of 1909 and attended for the balance of that school year ending in June, 1910. The witness Watson testified that the defendant said he had settled for that whole school year. The son attended in all, three years, 1909-1910, 1910-1911, 1911-1912. The defendant denies that his son attended in 1910-1911 with his consent; but he does not deny that he attended in 1909-1910 with his consent and that he, the defendant, paid the expense therefor. Three witnesses, Watson, English (former president of the College) and Judge George A. Cooke (of the Supreme Bench) testified that the defendant stated that his son in 1910-1911 was a minor.

On November 10, 1911, the defendant wrote to Watson, the Treasurer of the plaintiff, a long letter which contains the following:

"As for the old amount they have my assurance of it and I shall send them a cheque for it before very long."

On January 22, 1912, F. C. English, President of the plaintiff wrote the defendant as follows:

"I have your letter of the 20 and in reply will say: Your son Eric received for his summers work \$135 credit on this years tuition and board and his board for the summer. Had he remained in our dormitory there would have been due \$15, on the first half year, but he has left since holidays to board in the hotel and the only bill he will have for the remainder of the school year will be for his books and \$25 tuition. There is due for last year tuition & board.....\$270
Bks..... 16.50
For books this year..... 5.25
And \$25 for the rest of this year

I trust you will favor us with a remittance before Feb. first. I have constant admiration for your son and his progress, and sincerely trust we can have nothing to mar our work in any form."

On January 30, 1912 the defendant answered the latter letter, in part, as follows:

"You will please find enclosed cheque for twenty five dollars for tuition of Eric for balance of this year as claimed by you due, also cheque for \$5.25 for books for this year.

Cheque for the balance due for last year will be forwarded as soon as I reach it which will be in a short time."

The defendant having permitted his son to attend William & Vashti College in 1909-1910 and receive tuition, board and lodging on his own account and then himself, the defendant, having paid for these services without objection, it is a reasonable presumption that the son had authority and was the agent of the father to contract for these services; and considering what the record in this case discloses in regard to the three school years, 1909, 1910 and 1911, and particularly the evidence to the effect that the son was under age at the close of the school year in the summer of 1911; that the defendant had settled for his son's school expenses for the year 1909-1910; that he knew of his son's attendance in 1910-1911; that in the letters above mentioned he ratified what had been done for his son in 1910-1911 and promised

in writing to pay therefor; we are of the opinion that the plaintiff is entitled to claim, and that it is sufficiently proven that he, the defendant, authorized his son to receive the tuition, board and lodging for the year 1910-1911 on his, the defendant's account, and that he is liable to the plaintiff therefor. Murphy v. Ottenheimer, 84 Ill. 39.

Objection was made by the defendant to an allowance by the trial judge for the sum of \$4 for attendance and \$46.18 for mileage taxed as costs.

On October 7, 1914, the defendant served notice on the plaintiff that he would take depositions of E. C. Davis at Stillwater, Minn. at 10 o'clock a.m. on October 30, 1914 before a certain notary public. At the appointed time and place the plaintiff's attorney appeared and, inasmuch as no witness was called for lack of service or other reasons, plaintiff's attorney returned and the charges mentioned in the order of the trial judge were made. The only excuse given by the defendant why the charge should not be allowed is that on October 29, 1914, before the hour of 6 p.m. (which was the day before the time set for the taking of the depositions) the attorneys for the defendant notified the attorneys for the plaintiff that they had been unable to locate the witness at Stillwater, Minn. and would, therefore, be unable to take his desposition there on October 30, 1914. The evidence shows that the notice was too late reasonably to prevent the attorney for the plaintiff making the journey to Stillwater.

We are of the opinion that the trial judge was justified in finding that the defendant was chargeable

in this case, the fact that the defendant was not a member of the organization at the time of the commission of the crime is not a defense. The fact that the defendant was not a member of the organization at the time of the commission of the crime is not a defense. The fact that the defendant was not a member of the organization at the time of the commission of the crime is not a defense.

Defendant was not a member of the organization at the time of the commission of the crime. The fact that the defendant was not a member of the organization at the time of the commission of the crime is not a defense. The fact that the defendant was not a member of the organization at the time of the commission of the crime is not a defense.

On October 1, 1914, the defendant was not a member of the organization at the time of the commission of the crime. The fact that the defendant was not a member of the organization at the time of the commission of the crime is not a defense. The fact that the defendant was not a member of the organization at the time of the commission of the crime is not a defense.

The fact that the defendant was not a member of the organization at the time of the commission of the crime is not a defense. The fact that the defendant was not a member of the organization at the time of the commission of the crime is not a defense.

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with witness fees and mileage.

Finding no material error in the record, the judgment is affirmed.

AFFIRMED.

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MARIE SLAD, VACLAV SLAD, FRANK SLAD,
LOUIS SLAD, MARY SYKORA, EMIL SLAD,
EMILY SLAD, CHARLES SLAD, and ANTON
SLAD, BESSIE SLAD, JOSEPH SLAD and
ROSIE SLAD, minors, by Marie Slad,
their next friend,

Plaintiffs in Error, ERROR TO

vs.

CIRCUIT COURT,
COCK COUNTY.

FRANK G. HAJICEK,

Defendant in Error.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

On November 19, 1912, the plaintiffs began an
action of trespass on the case in the sum of \$10,000
against the defendant and on January 30, 1915, filed a
declaration containing the common counts and a count on
an account stated. It was then ordered that the plain-
tiffs file a bill of particulars showing in said bill of
particulars their cause of action; and accordingly, on
the same date, the plaintiffs filed a bill of particulars.
The defendant demurred to the declaration and on May 15,
1915, the trial court entered an order sustaining the
demurrer and dismissing the suit at plaintiffs' costs.
The matter is now before us on a writ of error.

The declaration (considering the bill of particu-
lars as a part thereof) contains substantially the follow-
ing allegations:

That on May 27, 1908, Frank Slad, the
husband of Marie Slad, and the father of the
other plaintiffs died intestate, leaving
surviving him the plaintiffs who were his
widow and heirs at law; that prior to Sept-

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ember 1, 1906, the said Frank Slad delivered certain promissory notes to the defendant, upon which notes the defendant collected about \$4,000; that the defendant, who had been managing the real estate and affairs of Frank Slad, collecting interest and paying taxes for him in his life time, received and held the said \$4,000 as the money of the said Frank Slad; that on or about May 1, 1906, the defendant, anticipating the payment of said \$4,000 to him, advanced and paid out of the moneys then in his hands belonging to the said Slad and out of his own funds about \$999.55 in payment of a certain note made by said Frank Slad; that after the payment of said \$4,000 to said defendant the said Frank Slad allowed that amount, or the balance thereof, after the defendant had reimbursed himself for previous outlays and advances, to remain with the said defendant and to be by him invested so as to produce some income for him, Frank Slad; that thereafter, on May 27, 1908, Frank Slad died intestate; that letters of administration upon his estate were issued by the Probate Court of Cook County, Illinois, to the defendant who duly qualified as administrator, but did not inventory the charge to himself, said sum of \$4,000, nor any part thereof, but stated in his inventory that there was no personal property in said estate of Frank Slad; that the defendant personally and individually, and not as administrator of said estate, converted said \$4,000 or the remaining balance thereof to his, the defendant's own use; that because of the death of the said Frank Slad, the evidence of said facts are with the said defendant and accessible to him and not within the knowledge of or accessible to the plaintiffs.

It is contended by the plaintiff that an administrator de bonis non can take and administer only assets not previously administered by his predecessor; that a conversion of assets through a maladministration of them is yet such an administration as will prevent an administrator de bonis non from taking over the administration of such converted assets; and that, therefore, the plaintiffs, upon the face of their declaration and bill of particulars, have a right to recover.

The defendant, Frank Hajicek, is sued individually and not as administrator and the bill of particulars does not show whether he still remains administrator of said

estate or had been discharged; it alleges his appointment, but does not state whether or not that appointment has been revoked; whether or not he has filed his final account and had it approved and the estate declared settled. None of these matters are determinable from the face of the bill of particulars. For aught that appears the defendant is still subject as administrator to the jurisdiction of the Probate Court and the question raised by the plaintiff in error, as to the rights of a prospective administrator de bonis non, does not seem to be involved. The defendant in error in his brief volunteers the statement that the appointment of the defendant as administrator has not been revoked and that his final account has been approved and the estate declared settled. Those facts, however, are not set up in the declaration or the bill of particulars and cannot be considered by this court in determining whether the demurrer should have been sustained to the declaration. The fund herein sued for is personal property which is liable to all the debts due from the deceased and, therefore, as personal property, should be administered by the Probate Court. Elder v. Whittemore, 51 Ill. App. 668; Goodman v. Kopperl, 169 Ill. 136; Waterman v. Alden, 42 Ill. App. 294.

If the defendant personally had in his possession money belonging to the deceased or was personally a debtor of the deceased and subsequently became administrator of the estate of the deceased and failed to charge himself personally with that account in his inventory as administrator, it would seem to be reasonable in case an administrator de bonis non were appointed, to consider the personal obligation of the defendant to the deceased as newly dis-

action of the court; it is the duty of the court to
but does not state whether or not the plaintiff has been
reversed; whether or not he has filed the final account and
had it approved and the estate closed. Some of
these will be determined by the fact of the bill of
particulars. But the court is not bound to determine it still
subject as administrator to the jurisdiction of the probate
court and the question raised by the plaintiff in error,
as to the right of a representative administrator to bring an
action to set aside the will, is not presented in error in
his first voluntary. The statement that the plaintiff of
the defendant as administrator has not been reversed and that
his final account has been approved and the estate closed
settled. These facts, however, are not set up in the de-
claration on the bill of particulars and cannot be consid-
ered by the court in determining whether the defendant should
have been maintained in the final action. The final account
and for is personal property which is liable to all the
debts due from the deceased and, in addition, as personal
property, should be administered by the probate court.
Hester v. Hester, 21 Ill. App. 2d 106; Cook v. Hester,
122 Ill. App. 2d 106; Hester v. Hester, 21 Ill. App. 2d 106.
If the defendant personally has been reversed in the
money belonging to the deceased or the estate of the deceased
of the deceased and personally received or had control of
the estate of the deceased and is not a party to the bill of
particulars, then the court should not reverse the defendant
therein, it will have to be determined on an administrative
for the plaintiff to be reversed, as a matter of course,
obligation of the defendant to the deceased as newly dis-

covered assets. Chap. 3, Sec. 70 Hurd's Statutes. That, however, does not seem to be involved here, considering the present state of the record. It does not appear from what the plaintiffs have set forth but that they can obtain ample relief in the Probate Court. Considering the facts as set forth in the declaration and bill of particulars, there is nothing to prevent the plaintiffs in error from filing a petition in the Probate Court, asking that court to act as to the alleged debt of the defendant to the estate of which he is administrator; and if he has already been discharged he may be cited in and the Probate Court asked to vacate the order approving his final account, and permitting the plaintiffs to make apt objections thereto. Anderson v. Patty, 168 Ill. App. 151; Platt v. Williams, 175 Ill. App. 1. If the Probate Court then removed the defendant as administrator, an administrator de bonis non could be appointed, who would proceed to recover from the defendant what he might be shown personally to owe the deceased; and it would then be within the jurisdiction of the Probate court. Heppe v. Szczepauske, 209 Ill. 98; Atherton v. Hughes, 156 Ill. App. 215.

We are of the opinion that the Probate Court, having taken jurisdiction of the estate of the deceased, and still retaining that jurisdiction (which we assume from the allegations of the declaration and bill of particulars), has exclusive jurisdiction and that this suit at law cannot be maintained. Elder v. Whittemore, (supra); Goodman v. Kopperl, (supra); Waterman v. Elder, (supra); Strauss v. Phillips, 189 Ill. 9.

Finding no material error in the record the judgment is affirmed.

AFFIRMED.

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HODGES FIBER CARPET CO.,
(a corp.),

Defendant in Error,

vs.

THE HUGRO MANUFACTURING CO.,
(a corp.),

Plaintiff in Error.

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203 I.A. 404

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

When this case was called for trial below counsel for defendant moved to suppress certain depositions that plaintiff offered in evidence. The motion was denied, the depositions were received in evidence and the court based its finding thereon and entered judgment for the plaintiff.

The depositions were taken in New York City. The notice designated May 18th as the time but they were taken May 25th, 1914. Whether there was a continuance or not does not appear. But it was held in Indiana, etc. Ry. Co. vs. Wilson, 77 Ill. App. 603, that the failure of the certificate of the notary, before whom the depositions were taken, to show an adjournment is a mere irregularity which in the absence of any evidence tending to show that one of the parties was injured or surprised thereby is not sufficient to warrant the suppression of the depositions. No injury or surprise was shown in the instant case unless defendant's counsel failed to receive notice of the taking of the depositions. But the court held, and properly we think, that the notice was received.

The depositions were filed within a week after they were taken. Nearly six months elapsed before the case was called for trial. It was the duty of defendant's counsel, having received notice of the taking of the depositions, to ascertain whether they had been returned and to present his motion to suppress before the case was called for trial. It was too late to make the motion at that time. (I. C. R. R. Co. vs. Foulks, 191 Ill. 57.) The motion was, therefore, properly denied, and as there was sufficient competent evidence in the depositions to support the judgment, it should be affirmed.

AFFIRMED.

203 I.A. 410

JOHN F. DEVINE, Administrator
of the Estate of Hilda E. Hillman,
Deceased,

Appellee.

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BAILES
DELIVERED THE OPINION OF THE COURT.

Appellee's intestate was struck down and killed in her attempt to cross in front of a moving street car after passing from behind another on a parallel track five feet away. Appellant, the street car company, urges a reversal of the judgment on the ground, among others, that there was no proof of the exercise of ordinary care by the deceased for her own safety, a view the record compels us to take.

The accident took place in Chicago at the intersection of three streets, 73rd Street running due east and west, Ellis Avenue running into it at right angles from the north but not across it, and South Chicago Avenue running northwest and southeast across 73rd Street at its junction with Ellis Avenue. The street car line was on South Chicago Avenue. The car behind which deceased passed was on the east track going northwest, and the car that struck her was on the west track moving southeast. The former had stopped on the north side of 73rd Street to take on a passenger, Mrs. Peterson, whom Mrs. Hillman, the deceased, had accompanied from the south side of 73rd Street. Several of appellee's

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witnesses followed them to take the same car but it started up before any of them except Mrs. Peterson boarded it. Mrs. Hillman bade her good-bye near the car, intending to go west on 73rd Street. She was familiar with the locality and the passing of cars there. Immediately after the car started up she walked from behind it to the other track and was struck down when she reached about the middle of said track and then was carried on the car fender to near the middle of 73rd Street where the car stopped.

From the middle of one track to the middle of the other was between eight and nine feet. Her position immediately behind the north bound car when she started towards the west track prevented her from seeing the other car, and the motorman thereon from seeing her until the movement of the two cars brought her and the motorman in a line of unobstructed vision. The motorman said she was then about in the middle of the east track, and about fifteen feet from him. The evidence tends to show that the car stopped from thirty-five to forty feet away, as soon as a car running eight miles an hour could ordinarily be stopped. The deceased was accompanied by two of her children, one five and the other thirteen years old. The former "skipped" over ahead of the car, and the other was thrown back to the east of it without injury.

Plaintiff's evidence was directed mainly to the speed of the car and failure to give a warning. But it is unnecessary to discuss the question of defendant's negligence in the absence of plaintiff's failure to prove the exercise of ordinary care by the deceased for her own safety. It was incumbent on plaintiff to make such proof and without it recovery cannot be had. (Newell v. C. C. C. & St. L. Ry. Co.,

Witnesses testified that he took the woman out but it is stated
up before any of them and the woman, however, however it was
Hillman had been going to the bank, intending to go west
on that day. He was familiar with the locality and the
passage of cars there. Immediately after the car was
up the witness took control of it to the car and was
struck down when she learned about the killing of a girl
and then was carried on the car to the hospital to have the
first time when the car was stopped.

From the middle of the street he saw the car and the
other car behind eight and ten feet. It was a light
immediately behind the car and was about a foot
toward the rear of the car and was about a foot
over, and the witness saw the car and the witness
movement of the car and the witness saw the car
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saw the car and the witness saw the car and the witness
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Witnesses testified that the car was about eight feet from the car and the witness
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recovery cannot be had. (Hillman v. C. & N. R. Co.)

261 Ill. 505.) There was no direct proof of the exercise of such care and the circumstances were not such as to supply it. On the contrary the proof supports the opposite conclusion. If she ought to have looked under the circumstances, as we think, and could have seen the car had she looked, as the evidence shows, for it was well lighted and the night was clear, and then failed to look as is also manifest from the evidence, then she must be deemed to have been guilty of negligence in fact. While the accidents arising from such a situation are frequent and deplorable, yet it is deemed negligence in fact for a party in passing from behind one street car that necessarily obstructs his vision of one approaching from an opposite direction on an adjacent parallel track, to attempt to cross the latter's track without first looking to see whether there is a car so approaching, when in the ordinary course of affairs one may be there. The cases so holding are numerous. There being no ground for distinction between them and the case at bar on this question, it is enough to refer to them without discussion. (Von Holland v. C. C. Ry. Co., 148 Ill. App. 320; Burke v. Same, 153 id. 388; Brown v. Same, 155 id. 434; Healy v. Same, 167 id. 524; Binder v. Same, 175 id. 503; Ohnersorge v. Same, 177 id. 134; Porter v. Same, 187 id. 28; Casey v. Same, 191 id. 74.)

Several of plaintiff's witnesses were only a few feet away from deceased and saw her when she walked from one track into the other. Their description of her movements indicate that she neither hurried nor drew back from the time she emerged from behind one car until struck by the other, and that she did not look towards the approaching car. Appellee argues from certain evidence that her back

201 111. 500.) There was a direct proof of the existence

of such a law in the circumstances were not such as to

suggest it. In the contrary the great majority of the negative

conclusion. It was a fact to have looked under the circum-

stances, as we think, and could have been the only one

looked, as we think, for it was all right and

the night was dark, and when I tried to look as it was

manifest from the evidence, and a fact to have

been a fact of significance in fact. With the evidence

existing from the evidence and the fact to have

yet it is clear that the fact to have

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circumstances. (See 111. 500.)

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was towards the latter, and that she was going southward to reach the north sidewalk of 73rd Street to go west thereon. While we think the weight of the evidence is that she moved only a few feet and almost directly over after leaving the east track before reaching the west track, yet the farther she went to the southward the greater was her opportunity to see the approaching car on the other track. Plaintiff's theory of her exercising due care is not aided by his construction of the evidence. He made no attempt to examine his witnesses on the subject of looking out for such car. On the contrary we find that on cross examination, one of them said "she walked right ahead without looking", another said, "I didn't see her do anything except walk right straight ahead at an ordinary walk, right up to the instant the car struck her; and I didn't see her look towards the car or look in either direction," and another said "just about the instant she was hit I did see her look towards the car. It was too late then, of course." In view of such evidence and the absence of any direct or circumstantial proof of the exercise of care by deceased for her own safety, it was error to deny the motion for a directed verdict for defendant made at the close of plaintiff's case. As there was no evidence subsequently given that supplied this deficiency, it is incumbent on us to reverse the judgment with a finding of fact.

If it could possibly be said that she had the right to rely on her sense of hearing, still we think that the negative testimony of certain witnesses that they heard no gong, is unavailing against the clear and positive testimony that the gong was sounded. (Brown v. C. C. Ry. Co., supra.)

REVERSED WITH FINDING OF FACT.

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Co., supra.)

540 - 21938

FINDING OF FACT.

We find that the deceased, Hilda E. Hillman,
was guilty of negligence that contributed to her injury
and death.

585 - 21983

GERTRUDE L. EMERSON,
Appellee,

vs.

CHICAGO CITY RAILWAY
COMPANY,
Appellant.

203 I.A. 412

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Gertrude Emerson, the plaintiff, was injured while alighting from one of appellant's street cars on which she was a passenger, and in this suit recovered a judgment on account of her injuries for \$5000, after a remittitur of \$500.

It is urged that the verdict was against the weight of the evidence, that improper evidence was admitted, and that the damages are excessive.

The declaration is predicated on two theories of negligence, (1) in starting the car while plaintiff was attempting to alight therefrom, and (2) in permitting a metal strip on the rear step of the car to be in a loose and unsafe condition whereby the heel of plaintiff's shoe was caught under it, causing her to be thrown therefrom into the street.

Besides herself, plaintiff produced three witnesses of the occurrence, two of whom first saw her after she had fallen from the step, and one as she fell. Defendant's two witnesses to the occurrence, the conductor and one of its investigators, testified that the car was stand-

ing still at the time plaintiff fell. She alone testified that the car started up at the time with a jerk, and she has some corroboration in the admitted fact that the conductor gave a stop signal after she fell and immediately before it a signal to start. The element of credibility enters into the question, and we cannot say that if the verdict was based on the theory that she fell because the car gave a jerk when she was attempting to alight, it is manifestly against the weight of the evidence. Such a jerk following from a starting and almost immediate stopping of the car, in obedience to the signals given, may have been imperceptible to the only two witnesses away from the car who saw her fall, one plaintiff's and one defendant's, and yet have been sufficient to cause the accident.

As to the condition of the metal on the step the testimony was again conflicting, plaintiff's three witnesses testifying that they examined the step immediately after the accident and found the metal plate loose, so that pressure on the outer edge of it raised up the inner edge, from a quarter to a half inch, and three of defendant's employees testifying, one who examined it with one of plaintiff's witnesses, and two who examined it after the car reached the barn without opportunity for repair, that the metal plate was tight. We are unable to say which set of witnesses was the most reliable. The jury was better able to decide that than ourselves. Surely we cannot say the verdict, if based on ^{the} theory that the heel of her shoe caught on the back of a loose plate, is manifestly against the weight of the evidence. Whichever theory of fact the jury adopted we find no warrant in the record for holding that the weight of the evidence is manifestly against it.

Complaint is made against permitting one of plaintiff's witnesses to testify that right after the accident he put his heel on the step to see if it would catch on the plate, and it did. Defendant moved to strike out the evidence on the ground that it was an experiment on conditions not identical with those described in the occurrence. The witness said on cross examination that he stood with one foot on the ground and "the other as a person would be in stepping off, that is, facing out from the car" and that his heel so caught. We do not think that such circumstance, in view of other testimony showing that the width of the step was eleven inches and that the metal plate was four inches wide and flush with the step from its outer edge, and raised up on the inner side under pressure from the outer edge, is so dissimilar from the occurrence of plaintiff's stepping off as described by her, whatever the size or shape of her shoe, that such evidence is repugnant to the rule invoked against allowing proof of experiments. She weighed about two hundred pounds and the heel of her shoe came off. It was her remark that she caught it on the step that led to the examination of the step. It is possible, of course, that her foot may have slipped off the step and her heel caught on its edge. The conductor gave a description of the accident from which such an inference might be drawn. But it is argued with some force that from his position he could not tell whether her heel caught on the edge of the step or back on the plate. He didn't examine the plate. We cannot disturb the judgment on account of the admission of such evidence.

But we think the judgment is somewhat excessive and should be reduced \$1000. She had a fractured leg,

Complaint is made of this matter by one of
plaintiff's witnesses to testify that after the
meeting he put it on the table and it is said
again in the report, and it is said, however, that he
put the evidence in the report and it was an opportunity
on consulting the committee with those concerned in the
occurrences. The witnesses said that the committee also that
he spoke with one of the men and was with them in
a person could be in a position to, that is, to know that
from the way they were in the room. To do that think
that such a thing was, in view of what is known about
the fact that the man was in the room and that he was
the man who was in the room and that he was in the room
step from the room and that he was in the room and that
under the circumstances, the man was in the room and that
the occurrence of this is a matter of fact and that
up here, where the man was in the room and that he was
evidence in a statement to the man in the room and that
proof of the fact that the man was in the room and that
he was in the room and that he was in the room and that
mark that the man was in the room and that he was in the
evidence in the room and that he was in the room and that
has been a matter of fact and that he was in the room and
in the room and that he was in the room and that he was
the man was in the room and that he was in the room and that
up with the man and that he was in the room and that he was
told that the man was in the room and that he was in the
back on the floor. The man was in the room and that he was
between the man and the man and that he was in the room
evidence.

But as to the statement of the man who was in the room

and should be removed from the room and that he was in the room

suffered considerable pain, and was laid up for practically six months, and there was some evidence that she had an ankylosed condition. But neither her future ability to get about without artificial aid nor her earning capacity appears to be so reduced as to justify such a large judgment. If therefore appellee will within ten days remit \$1000 the judgment will be affirmed. Otherwise it will be reversed and the cause remanded.

AFFIRMED WITH A REMITTITUR.

AUGUSTA LEHMANN et al.,
Appellees,

vs.

CITY OF CHICAGO,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The only question in this case is whether the City of Chicago is liable for rent of certain premises for the months of March, April and May, 1911, all other questions having been eliminated from the record by agreement.

The premises were used for the City's administrative offices, and the lease therefor was duly authorized and ran from June 1, 1908 to June 1, 1910, and gave the privilege of renewal for an additional year, provided the lessee, the City, gave six months' notice of its desire for such renewal. None was given. But in November, 1909, evidently in expectation that the City would move into its new City Hall before June 1, 1911, and have no further use for the premises after so moving, Walter H. Wilson, who as city comptroller was authorized to execute leases for the City, held a conversation with the lessors' agent on the subject of extending the lease to March 1, instead of June 1, 1911. He claimed, and the agent denied, that a verbal agreement for such extension was then made. While the comptroller's version of the conversation was corroborated by his deputy, subsequent facts tend strongly to refute it.

On the 30th of the same month, a few days after the conversation, the comptroller wrote the agent, saying, "We accept your proposition * * * and would be pleased to have you prepare and submit a form of agreement extending the lease" (to March 1, 1911.) The agent wrote on the bottom of it, "I can not accept the above" and immediately returned it. The letter clearly imports a present and not a past acceptance by the City of an alleged proposition. The comptroller, however, on its return, wrote a second letter indicating a change of view on that subject, saying,

"You seem to be laboring under misapprehension of the facts. We have not made any proposition, but we *did* (italics ours) accept the proposition you submit, -- that is," etc; * * * "and we would be pleased to have you prepare and submit a form of agreement" etc.

To add to the manifest inconsistency of these letters both the comptroller and his deputy testified at the trial that the proposition referred to emanated from the comptroller and not from the agent, -- the precise position then taken by the agent. For on December 1, (the following day) Smith & Wallace, Attorneys, purporting to speak for the agent, wrote to the comptroller, expressly disavowing the agent's making either a proposition or an agreement. The letter also said that as the City had not given notice of its desire for the extension provided for in the lease it would be expected to surrender possession of the premises June 1, 1910. Of course, such a notice, if authorized, was not required by law, and superfluous for the lease expired at that time by its terms. It amounted, therefore, to a mere reminder of the legal effect of the lease, and had no bearing on the character of the tenure after the lease expired if the landlord assented to the holding over.

(2 Tiffany on Land. & Ten. 1461; Secor vs. Pestana, 37 Ill. 525; Clapp vs. Noble, 84 id. 62.) While, however, appellant's principal contentions are predicated either on said oral agreement or on said notice yet it made no proof of authority to bind lessors in respect to either. That the agent had authority to make a new agreement, or that Smith & Wallace were authorized to write such letter in behalf of the lessors is left wholly to conjecture.

But even had there been proof of authority in both instances, the defenses predicated thereon would fail because of the preponderance of evidence against the existence of an oral agreement and because said notice, if it be so construed, was waived.

The City made no reply to the letter of December 1st. Its attitude was that of accepting the disavowal of an oral agreement and regarding the matter as a closed incident. Not before the City vacated the premises in March, 1911, was any allusion made to either such agreement or such notice. After the expiration of the lease June 1, 1910, it continued to remain in possession of the premises, paying on demand at the beginning of each month the rent stipulated for in the lease, practically conforming to its terms in every respect except that no rent was paid after Dec. 1, 1911. The obligation to pay rent for three months thereafter was not questioned, the comptroller saying on demand therefor that he "was not ready to pay". Warrants therefor were issued but not delivered. In no other respect were conditions changed from what they had been during the entire tenancy until the city began to move from the premises in February, 1911.

All the facts, including the conduct of the parties

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to the lease, were consistent with a holding over on the terms of the lease without a new agreement. By accepting payment of the monthly rent after the expiration of the lease according to its terms the landlord elected to treat the City as a tenant from year to year. (Epstein vs. Kuhn, 225 id. 115; Goldsborough vs. Cable, 140 id. 269) and the continued possession by the City, which had no election in the matter, fixes its character as such. (Taylor's Land. & Ten. (7th Ed.) sec. 22.)

There was considerable evidence bearing on the question whether the premises were fully vacated March 1, 1911, or a few days later. If there was no oral agreement and the holding over implied a tenancy from year to year or assent to extension for another year according to the provision in the lease therefor, it is immaterial whether the City vacated the premises March 1st or later. And if the City was liable for rent for the full year, whether it occupied the premises or not, we need not consider the fact that it made no appropriation for the last three months of it.

The case was submitted to the court for trial without a jury. Its finding of damages in the amount of \$51,607.31 included unpaid rental, according to the terms of the lease, to June 1, 1911. Such conclusion, therefore, involved finding that there was no oral agreement. In this we concur, not only because the preponderance of evidence is against it, but because there was no proof of authority by the agent to bind his principal to an agreement different from the written lease.

Whatever view the court took of the so-called notice contained in the letter of December 1st, 1909, it was

justified in disregarding it altogether in the absence of proof of authority to give a notice for the lessors. Even if it could be deemed an authorized notice to quit, it was, under the foregoing circumstances, waived, and the tenancy re-established upon its former footing. (Washburn on Real Prop. 3rd Ed. p. 524.) Whatever view, therefore, may be taken of the so-called notice it ceases to be an important element in the case. With the elimination from the case, therefore, of the main facts on which appellant relies, - an oral agreement and notice to vacate, there are no facts to distinguish this case from any other where the presumption of a tenancy from year to year arises from holding over on the payment and acceptance of monthly rent, according to the terms of a prior lease for a year or more, unless the doctrine is not applicable, as appellant claims, to a municipal corporation acting in its governmental capacity.

With these two facts eliminated appellant practically concedes that a tenancy from year to year would be created with a natural person under like conditions, but argues that inasmuch as the City did not use the premises during the three months in question and as an action to recover rent for that period must be based on an implied contract from holding over beyond the term of lease, the City cannot be held liable. The cases cited in support of this contention turn on some fact not present in the case at bar or hinge on the lack of authority to bind the municipality for the period that was in question. No question of authority arises here. Authority to bind the City in the execution of the lease at bar or for the period in question is admitted. And perhaps it might be said that the holding over was under the privilege granted by the lease, the landlord waiving the notice required by it. But we need not decide that

justified in disregarding its allegations in the absence of
proof of authority to give a notice for the lease. Even
if it could be deemed an authorized notice to quit, it was,
under the foregoing circumstances, waived, and the tenancy
re-established upon its former footing. (Widdowson on Rents
Prop. 3rd Ed. p. 544). However true, therefore, may be
taken of the use of notice it seems to be an important
element in the case. With the exception from the case,
therefore, of the main facts on which appellant relies,
an oral agreement and notice to vacate, there are no facts
to distinguish this case from any other where the presumption
of a tenancy from year to year, or a term holding over on
the payment and acceptance of rent, according to the
terms of a prior lease, or a term or rent, makes the doctrine
is not applicable, as a general rule, to a landlord
corporation acting in its governmental capacity.
In the case of these corporations, a tenant
practically concedes that a tenancy from year to year would
be created with a certain date on which his possession, but
argues that possession on the date of the notice to vacate
during the term would be a breach of the lease and so void as to
revert back to the landlord. It is not clear from the record
contract "holding over" as a term of years, the right
cannot be held liable. The same view is expressed in the
contention that in some cases the tenant is to be held liable
or hinge on the lack of authority to give the notice.
For the purpose of the question, the question of authority
arises here. Authority to bid the city in the execution of
the lease at one or two the period of the lease is admitted.
And perhaps it may be said that the notice was never under
the privilege granted by the lease, the landlord having
the notice required by it. But we need not decide this

question, for authority on the liability of the city from holding over is not wanting.

In the case of Davies vs. Mayor, etc. City of New York, reported in 83 N. Y. 207, and 93 N. Y. 250, on different appeals, the original lease of rooms for the city recorder for the period of one year from May 1, 1872, was executed with authority and there was a holding over until July 1, 1877, when the rooms were vacated for the occupancy of others that had been arranged for before but not occupied until after May 1, 1877. The suit was brought for the unpaid balance of rent up to May 1, 1878, and the city's liability therefor was in principle upheld. In its decision on the second appeal the court said:

"It was the duty of the City, if it desired to terminate the lease, to surrender possession. * * * The plaintiff had a right to assume, in the absence of notice, that his (the Recorder's) remaining in possession after May 1, 1877, was by authority or acquiescence of the defendant, and to treat it as a renewal of the lease for another year." (253)

The essential facts at bar are so similar to those in the case cited that we need not undertake to apply the principles announced in said decision further than to say that the lease here having been authorized and the city having held over without a new agreement, it was under such circumstances bound to a tenancy from year to year the same as a private individual would have been, and if it wished to escape the legal effect of a tacit agreement to such a tenancy, then it was bound to break its silence after the disavowal of the alleged oral agreement or surrender ^{of} possession before the termination of the lease.

We find no room for application to the facts of this case of either the doctrine of implied contracts or that of estoppel as presented on this appeal. We think the judg-

rest should be affirmed.

AFFIRMED.

and about 10 minutes.

and 100.

203 I.A. 419

JAMES L. MARINO, for use of
Flavia Trucco, executrix under
the last will and testament of
Joseph Trucco, deceased,
Plaintiff in Error.

vs.

ANTONIO PARISI and NICOLA MONACO,
Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was a garnishment proceeding by Flavia Trucco, in her representative capacity, against Antonio Parisi and Nicola Monaco, garnishees, on a judgment for \$277.50 and costs, which she had obtained against one James L. Marino. Upon a hearing, the court dismissed the suit at plaintiff's costs and discharged the garnishees.

It appears from the evidence, that the said Marino had entered into a written agreement with the garnishee Monaco, by the terms of which the said Marino agreed to construct for the said garnishee, a certain building, at a cost of \$6,600; that \$300 had been paid to the said Marino at the time of its execution; that \$300 was to be paid on demand, and the remainder at the rate of 85% of the estimated value of the work performed, final payment to be made within 30 days after completion and acceptance of the entire work; that Marino waived, on behalf of himself and all subcontractors and others, the right to a mechanics' lien on said building or premises.

Garnishee Parisi, made a loan of \$6,400 to the said Monaco, and was to pay out same as the building progressed, either to the said Monaco himself or as otherwise

3081 A. 118

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directed by him in writing.

Both garnishees filed answers in which they denied any indebtedness to the said Marino in any sum or sums whatsoever.

The evidence further shows, that after the garnishment proceedings had been commenced, and prior to the hearing thereon, sums aggregating upwards of \$1,500 were paid out by the garnishee Parisi to the said Marino, on orders signed by the garnishee Monaco.

The only question presented by the record now before us is, whether or not there was any money due the said Marino at the time the garnishment summons was served upon the garnishees, or to become due thereafter.

We are of the opinion that the garnishee Parisi was properly discharged. There is no evidence of any indebtedness either due or to become due, from the said Parisi to the said Marino. His contract to furnish money for the construction of the said building was with the garnishee Monaco, the owner thereof, and the said Marino, the general contractor, was not a party thereto.

But as to the garnishee Monaco, there is evidence that there was money either due or to become due, from him to the said Marino, with whom he had entered into the aforementioned contract. Upwards of \$1,500 was paid out on orders issued by the garnishee Monaco, after service of the said garnishee summons, which acted as an assignment of any funds then due or to become due the said Marino from garnishee Monaco. (Filcus et al. v. Kling, 37 Ill. 107.) Marino having expressly waived the right to a mechanics' lien on behalf of himself and all subcontractors and material men, such waiver was binding upon them. (Kelly v. Johnson, 251

1. The first of these is the

fact that the British have been
-and are still - in the process of
-dissolving.

2. The second is the fact that
-the British have been in the process
-of dissolving the British Empire
-and are still in the process of
-dissolving the British Empire.

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-of dissolving the British Empire
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-of dissolving the British Empire
-and are still in the process of
-dissolving the British Empire.

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-of dissolving the British Empire
-and are still in the process of
-dissolving the British Empire.

9. The ninth is the fact that

10. The tenth is the fact that
-the British have been in the process
-of dissolving the British Empire
-and are still in the process of
-dissolving the British Empire.

Ill. 135.) The court therefore erred in discharging the garnishee Monaco.

The judgment, so far as the garnishee Monaco is concerned, will be reversed, and judgment entered in this court in favor of James L. Marino for use of Flavia Trucco, executrix, and against the garnishee Monaco, for \$309.98, this being the amount due plaintiff under the aforesaid judgment, plus costs and interest to date.

JUDGMENT REVERSED AND JUDGMENT IN THIS COURT.

496 - 21394

CHICAGO & RIVERDALE LUMBER
COMPANY, a corporation,
Appellee,

vs.

W. S. F. TATUM, doing business
as TATUM LUMBER COMPANY,
Appellant.

203 I.A. 421

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in favor of the appellee (plaintiff below) for the value of certain millwork and material.

On February 27, 1911 plaintiff submitted to the defendant at the latter's home at Hattiesburg, Mississippi, an offer in writing to furnish, for the sum of \$11,634.58, certain millwork and material described in a schedule thereto attached, to be used in the construction of a dwelling house to be erected at said place; also another offer to furnish, for the sum of \$365.42, certain lumber and building material described in a schedule thereto attached, to be used in the construction of a garage to be erected at the same place. Both offers were accepted by defendant on March 1, 1911 at the place aforesaid, and his acceptance noted thereon. Accordingly, the parties entered upon the performance of said agreement. After certain shipments had been made by the plaintiff, the defendant complained that the measurements of some of the material shipped did not conform to certain plans and specifications which he alleged formed a part of the contract hereinabove set forth. This gave rise to a controversy

1917

CHICAGO - 1134
COMPANY, a corporation,
Chicago, Illinois.

CHICAGO, ILL.

W.

CHICAGO, ILL.

W. S. F. FARM, being business
as shown on map
Chicago, Illinois.

THE CHICAGO, ILL. CO. OF THE CHICAGO, ILL. CO.

This is an appeal from a judgment rendered in

favor of the Chicago, ILL. CO. OF THE CHICAGO, ILL. CO.

certain lands and water.

On February 27, 1917, plaintiff committed to the

defendant, the Chicago, ILL. CO. OF THE CHICAGO, ILL. CO.

an order in writing to remove, from the lands of said

certain lands and water, a certain amount of

material, to be used in the construction of a building

to be erected on said lands, and a certain amount of

for the use of said lands, and in the construction

described in a certain report of the Chicago, ILL. CO.

operation of a certain building, to be erected on

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said lands, and a certain amount of material, to

between the parties, resulting in the discontinuance of further shipments, which finally culminated in the making of the following contract, dated July 3, 1911, at Hattiesburg, Mississippi:

"WHEREAS: On March first, 1911 Tatum Lumber Company, of Bonhomie, Forrest County, Mississippi, party of the first part, placed an order for certain millwork and material with the Chicago and Riverdale Lumber Co., of Riverdale, Chicago, Illinois, party of the second part, said millwork and material for residence of W. S. W. Tatum, as per plans, specifications and full sized details drawn by George P. Barber & Company, of Knoxville, Tennessee; and

"WHEREAS: A controversy has arisen in regard to the portion of the work that has been furnished on this order, and in order to make an amicable settlement of said controversy, it is therefore agreed as follows:

"First: The party of the first part agrees to use such of the material that is in Hattiesburg as conforms to the plans, specifications, and full size details.

"Second: That party of the second part agrees to replace and make good without expense to the party of the first part any and all portions of the material that is in Hattiesburg that does not conform to the plans, specifications, and full size details; and also agrees to replace and make good without expense to the party of the first part any material that is damaged in shipping.

"Third: It is agreed that the party of the first part shall purchase all mantels, art glass, and screen work from first class manufacturers of these various items; the price to be in line with prices named in specifications for mantels and art glass, and (12¢) twelve cents per square

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foot for screens and same to be deducted from contract price.

"Fourth: The party of the second part agrees not to manufacture or ship any further material on this order except such as conforms in every respect with the requirements of the plans, specifications and full size details, which are to be furnished by the party of the first part and agrees that the workmanship on all material shall be first class in every respect.

"Fifth: Whereas the material shipped has been primed without a full understanding between the parties; it is agreed that the party of the second part will make no charge for this painting.

"Sixth: It is agreed by the party of the second part that in case it shall fail to replace or furnish any material needed to make any part of the shipment now in Hattiesburg conform to the requirements of the plans, specifications, and full size details, after fifteen days' notice from the party of the first part, then and in that case the party of the first part is authorized to replace or furnish same and charge the cost of said material to the party of the second part.

"Seventh: It is agreed by the party of the second part in the event it fails or refuses to furnish in accordance with the requirements of plans, specifications and full size details, any portion of the work still due on this order, within (60) sixty days after building is ready for measurements to be taken and the party of the second part is notified by mail, that after giving (30) thirty days written notice, the party of the first part shall be authorized to supply same and charge the cost of such material to the party of the second part.

"Eighth: The party of the second part hereby agrees

foot for several years to be taken from the list of prices.

"Article 10. The price of the goods shall not be

subjected to any change in the course of the year.

except such a change as may be necessary in the course of the year.

means of the goods, specifications of the goods, and

which are to be included in the list of prices.

and agreed that the responsibility on the part of the

first class in every respect.

"Article 11. The goods shall be delivered to the

without a bill of lading, and the goods shall be

agreed that the goods shall be delivered to the

for this purpose.

"Article 12. The goods shall be delivered to the

first class in every respect, and the goods shall be

needed to make any change in the list of prices.

concerning the goods, specifications of the goods, and

full class of goods, and the goods shall be delivered to the

of the first class, and the goods shall be delivered to the

first class in every respect, and the goods shall be

the cost of goods shall be taken from the list of prices.

"Article 13. The goods shall be delivered to the

in the event of a change in the list of prices.

with the goods, specifications of the goods, and

details, and the goods shall be delivered to the

within the list of prices, and the goods shall be

to be taken from the list of prices, and the goods shall be

full, and the goods shall be delivered to the

party of the first class, and the goods shall be

and the cost of goods shall be taken from the list of prices.

second part.

"Article 14. The goods shall be delivered to the

to furnish bond in good Surety Company to the amount of Five Thousand Dollars (\$5000.00), as a guarantee that it will perform faithfully its part of this contract, said bond to be payable to the party of the first part."

Subsequently shipments were resumed by plaintiff. Defendant, however, continued to complain that some of the material received by him did not conform to the measurements called for by the plans and specifications referred to in contract of July 3rd.

Defendant also was a dealer in lumber. Between October, 1910, and August, 1912, he made shipments of lumber to the plaintiff, aggregating in value some \$8,000, for which the latter gave him credit. He also received credit for certain miscellaneous items, such as defective millwork furnished by plaintiff and returned by the defendant, etc. Plaintiff's claim is set forth in the pleadings as follows:

| | |
|--|--------------------|
| "To amount as per contract order - - - - - | \$12,000.00 |
| To extras - - - - - | 1,157.12 |
| To freight - - - - - | 18.34 |
| To interest - - - - - | 790.11 |
| | <u>\$13,965.57</u> |
| By credits - - - - - | \$1136.00 |
| By lumber delivered - - - - - | 8359.53 |
| Total credits - - - - - | <u>9,495.53</u> |
| Balance due - - - - - | \$4,470.04 |

The jury returned a verdict in favor of the plaintiff, for the sum of \$3581.35 upon which judgment was entered.

The paramount question here presented is, the construction to be placed upon the contracts hereinabove mentioned, i. e. the contract of March 1st and that of July 3rd, 1911.

On the trial below, defendant sought to introduce evidence tending to show that the contract of March first was partly oral and partly in writing, and that the plans and specifications in question formed a part thereof. The apparent object of this offer was to show that the plaintiff

Five "The Great Escape" (1963), as a "documentary" and is
to furnish same in good variety Company to the extent of
with persons identified the part of this company, said

"...and further, it is stated that the following are the names of the persons who were present at the meeting held on the 1st day of May, 1908, at the residence of the said John J. Smith, at the address of 123 North Main Street, New York City, as follows:

1. The first step is to identify the problem or question that needs to be answered.

Defendant, however, continued to originate this same type of material received by him from the respondents and to have the material copied to be sold for by the same and specific items referred to in contract of July 2nd.

referred to in the above report. The following information was obtained from the Bureau of the Census, Washington, D. C., on the subject of the above mentioned report.

to the "United States" and the "United States"

which the latter got his name. The name "Lithuania" was given to the country by the Lithuanians, who were the first to settle there.

[illegible][illegible]

had in fact agreed to furnish all the material called for by the plans and specifications, a number of which items were not included in the aforesaid estimates. The court, however, excluded such offered evidence, and defendant now contends that the court erred in so doing.

We are of the opinion that this evidence was properly excluded. While it appears from the evidence, that in the preparation of these estimates and detailed schedules thereto attached, plaintiff had before it the plans and specifications in question, yet the estimates do not in any way refer to them, but, on the contrary, purport to be complete in themselves. Furthermore, they were submitted in their entirety to the defendant for his inspection and approval, and accepted by him with a minor change thereon noted. This constituted a complete contract in writing to furnish a definite quantity of material for a price therein mentioned, and under the well-settled parol evidence rule, the terms thereof cannot be enlarged by oral evidence.

It is next contended by defendant, that the court erred in striking certain items from defendant's claim of set-off. In so doing, the court held, inter alia, that the defendant could not recover from the plaintiff any expense incurred by him for labor or superintendence in reconstructing or reforming material delivered by plaintiff which did not conform to the plans and specifications, and that by the contract of July 3, 1911, defendant was limited in his right of recovery for any damages that might result from any future breach of that contract, to the provision contained in clause 7 thereof, but that it was a complete accord and satisfaction for all damages accruing prior thereto.

In our opinion, the contract of July 3 is supple-

had in fact agreed to furnish all the material called for by the plans and specifications, a number of which items were not included in the original estimate. The court, however, excluded such evidence, and defendant now contends that the court erred in so doing.

As one of the reasons for this exclusion was properly excluded. This is because from the evidence that in the preparation of these estimates and schedules there were attached, defendant's failure to the plans and specifications in question, yet the estimates do not in any way refer to them, but, on the contrary, purport to be complete in themselves. Furthermore, they were submitted in their original form to the defendant's inspection and approval, and accepted by him as such. When change thereon made. This constitutes a complete waiver in writing to furnish a definite quantity of material for prices therein recited, and under the well-settled rule of evidence, the fact that a party has omitted to state evidence.

It is next contended by defendant that the court erred in striking certain items from the estimate of its cost. In so doing, the court held, first, that the defendant had not recovered from the plaintiff the amount inured to him for labor or engineering and not in recovery of performing material. This is a definite finding, and did not concern to the plans and specifications, and by the court of July 1, 1911. It was not limited to his right of recovery for any labor or engineering, but his right of recovery for the plaintiff's cost, as the plaintiff's cost, but that it was a complete recovery and satisfaction for all labor and material therefor. In our opinion, the contract of July 1, 1911, was

mental to that of March 1st, and both should be construed together. The obvious purpose of the supplemental contract was to require plaintiff to furnish the material called for in the original contract, in accordance with measurements contained in the plans and specifications, and to afford defendant the additional right to purchase such material in the open market and charge the cost thereof to plaintiff upon the latter's failure to furnish same, upon notice, within the time provided in clause 7 thereof. It will be noted that the supplemental contract of July 3rd contains no details respecting the material furnished and to be furnished, such as quantity, price, etc. Without such information said contract is incomplete, hence in order to arrive at the intent of the parties, we must read the two together.

We think the trial court properly held that clause 6 of the supplemental contract expressly fixed the rights and limited the liability of the plaintiff, with respect to the damages for material already delivered, and that it was a complete accord and satisfaction of the damages that had accrued prior thereto.

Clause 7 required plaintiff to manufacture material to be delivered in the future, according to the plans and specifications, and provided that in the event of the failure of the plaintiff to do so, upon the giving of the requisite notice, defendant was authorized to purchase said material in the open market and charge the cost thereof to the plaintiff. As we view this clause, the remedy therein provided is optional, and does not deprive the defendant of his common law right to recover damages for a breach of the contract, nor does this clause by its terms purport to limit the liability of the plaintiff for a breach thereof.

A case very much in point is Kemp et al. v.

Freeman, 42 Ill. App. 500. This was an action for an alleged breach of warranty of a stallion. Kemp recovered a judgment of \$500 against Freeman, although there was an express warranty whereby the vendor agreed to replace the stallion should he prove a poor breeder. In affirming the judgment, this court stated, p. 501:

"The warranty was a written one, and so far as it concerns the issue here, is as follows:

'We warrant the animal to be sound and healthy and in every respect an average breeder, and in case he fails to be an average breeder we agree to take him back and replace him with another horse of equal value and merits.'

"The breach alleged is that the horse failed to be an average breeder.

"Appellants contend that this contract of warranty compelled the appellee in a case of a breach in this respect claimed, to return the horse, and accept in its stead another that possessed the quality required by the warranty.

"A contract no doubt might have been so framed as to deprive the appellee of his legal right to an action for damages in case of a breach, and to require him in lieu thereof to return the horse and accept another that would satisfy the warranty. The contract under consideration does not, however, even purport so to do, but on the contrary, by it the sellers warrant the horse to be an average breeder, and in addition to such warranty upon which the buyer may recover damages if there be a breach, the sellers agree that they will accept a return of the horse and replace him with another of merit and value equal to the warranty. Clearly the buyer has the option of an action on the breach for damages, or to return the horse and receive another in his stead.

"He selected an action at law for damages and no reason is known why he can not maintain it."

The foregoing decision is cited with approval in Cook v.

Lantz, 116 Ill. App. 472.

In Jackson et al. v. Cleveland, 19 Wis. 442, the court was confronted with a situation very much akin to that presented in the case at bar, and it was held that the right to recover general damages was not waived by a failure to exercise the option contained in the contract to assume completion of the work under construction. The following language on pages 430 and 431 is quite illuminating:

"It appears from the record that the defendant below called witnesses to prove his counterclaim set up in the answer and offered to show the damages which he had sustained in consequence of the breach of the contract on the part of the plaintiffs. This testimony was objected to and excluded on the ground, as stated in the bill of exceptions, that by the contract between the parties, the only consequence of a breach thereof on the part of the plaintiffs was to give the right to the defendant either to declare the contract at an end, or to employ men for the completion of the work at the plaintiffs' expense; and that no damages for a breach of the contract by them were recoverable as an offset to their claim. * * *

"According to our view there is nothing whatever in the contract which, upon any fair construction, can be said to deprive the defendant of the right to claim and recover any damages which he may have sustained by a breach of its provisions on the part of the plaintiffs. The reservation of the power to end the contract, if the work was not progressing with sufficient rapidity, or to put men on to complete it at the expense of the plaintiffs, cannot have the effect of destroying this right."

To the same effect are: Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Co., 161 Fed. 38; Webster County v. Nelson et al., 135 N. W. 390; Nowlin v. Pyne, 40 Iowa, 166; Garfield & Proctor Coal Co. v. Penna Coal Co., 84 N. W. 1020; Thomas China Co. v. Raymond Co., 135 Fed. 25. It follows from this that the trial court erred in its construction of clause 7 of the supplemental agreement.

It is also contended that the court erred in admitting evidence of an alleged custom which permitted the plaintiff to furnish millwork of scant dimensions measuring a fraction of an inch less than that called for by the plans and specifications. From an examination of the evidence adduced on this point, we are of the opinion that plaintiff has failed to prove a custom so general in its application or recognition as to make it admissible, nor is there any evidence tending to show that defendant had knowledge of such a custom or could be presumed to have contracted with reference to it, if such custom existed.

It is further contended that the court erroneously instructed the jury that plaintiff might recover interest

at the rate of five per cent per annum, on the balance found to be due, provided they believed from the evidence that defendant was guilty of unreasonably and vexatiously withholding payment thereof.

The contracts in question, both of which were executed in the State of Mississippi, make no provision for interest, and are silent with respect to the place of payment, in which latter event it must be presumed that the money was payable where they were executed (9 Cyc. 669 and cases cited); and the existence or nonexistence of the right to recover interest must also be determined from the lex loci contractus (Potter v. Taliman, 35 Barb. 182). The statutes of Mississippi relating to interest were not introduced in evidence, nor were they pleaded. Obviously, therefore, it was error to so instruct the jury. Nor was this error cured by the fact that defendant, in his plea of setoff, claimed interest by virtue of a certain section of the Mississippi code. Defendant did not set forth the provisions of said section. The court, therefore, had no way of determining whether or not interest was allowable under the said code, for unreasonable and vexatious delay.

Defendant makes the further point that the jury were erroneously instructed with reference to plaintiff's right of recovery for extras furnished to the defendant. The jury were told that plaintiff was entitled to recover the fair market value of all such extras, at the time and place such material was furnished. The vice pointed out by defendant is, that the instruction failed to differentiate between extras which were of the same general character as those specified in the contract, and those which were not. We are of the opinion that the jury were inaccurately instructed in this regard. Under the circumstances, the

extras furnished by plaintiff which were of the same general character as those called for in the contract, should be charged ^{for} ~~at~~ the contract price.

Other errors have been assigned by the appellant, but as the judgment must be reversed and the cause remanded for the reasons hereinabove assigned, we refrain from discussing them, in the belief that if errors were committed, on another trial they will not recur.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

extrinsic furnished by Plaintiff which was on the part of the defendant
character as shown earlier in the complaint, should be
charged ^{for} ~~at~~ the contract price.
Other errors have been assigned by the defendant,
but as the judgment was in favor of the plaintiff, remanded
for the reasons hereinbefore assigned, we will take from dis-
cussing them, as we believe in this case, were corrected, or
another trial may still be given.
The judgment will be reversed in the part
remanded.

WOOD STREET PLANING MILL
COMPANY,

Appellant,

vs.

INDUSTRIAL BOARD OF ILLINOIS,
et al.,

Appellees.

203 I.A. 431

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Charles Brichacek, an employee of appellant, was struck in the abdomen by a piece of wood hurled from a rip-saw which he was operating in appellant's plant. The injury occurred on July 23, 1913, from which death ensued on the following day, and this action was brought under the Workmen's Compensation act.

In the proceedings before the Industrial Board it was alleged by way of defense, that the accident did not arise out of and in the course of the employment. The committee of arbitration decided that the petitioner was not entitled to compensation, whereupon a petition for review was filed, and upon a hearing before the Industrial Board the petitioner was awarded \$3,500 as compensation for the death of the said Brichacek. The matter was then presented to the Circuit court by way of a writ of certiorari, where, upon consideration of the record, the court entered an order quashing the writ. This appeal brings before us for review the action of the court in so disposing of the writ.

The sole contention advanced by appellant is, that there is no credible evidence in the record to sustain the finding of the Industrial Board, and hence it exceeded

its powers in making the award in question.

The evidence shows that at the time of the accident the deceased was in the employ of the appellant, and that the injury occurred on the premises where he was employed, while operating a rip-saw; that at the time in question the regular foreman under whose immediate supervision the deceased had worked, was away on his vacation, and that meanwhile one Charley Fenslow, a teamster, acted as foreman in his stead; that on previous occasions, while in the course of his employment, the deceased had operated various wood-cutting machines in appellant's plant, among them being the rip-saw which caused his death; that on the day of the accident, and for some time prior thereto, one Simon Bykowsky had served as helper to the deceased.

It is maintained by appellant that the deceased went to the rip-saw to cut a maple board, for some purpose of his own, at the time he was injured. It is undisputed that on the day of the accident the deceased had completed his work on the matching machine, and that Fenslow assigned him to some other work. There is a conflict in the evidence as to what Fenslow then ordered the deceased to do. Fenslow testified that he ordered the deceased to work on the re-saw machine, but the deceased, disregarding such order, went to the rip-saw for the purpose of sawing a board for his own use, and was injured. Bykowsky testified, however, that the deceased was ordered to work on the rip-saw in question, and that he was obeying such order when injured. On cross examination Bykowsky admitted that he understood but very little of the English language, - only a few words relating to his work - and from an examination of his testimony it is clear that his knowledge of the English language was very

meagre. In relating what occurred at the time the order was alleged to have been given, Bykowsky testified:

"He" (meaning the foreman) "showed him what board he should take and how he should cut it. * * * When the boss came up the machinist that was killed was pushing those planks, got a hold of him by the shoulder. * * * That was the man that I was helping. The boss took hold of his arm and asked him and showed him. He was going here and there to the machine. Just after the foreman took hold of the machinist by the arm, he told him to go back to the wall to the machine. He said, 'No. 2.' * * * The foreman pointed at the plank more than once. * * * There were about eight or nine boards that the foreman pointed to. * * * When I saw the foreman pointing to the boards I saw that he indicated with his finger which board he should take and drew his finger across the board and told him how to cut it. He just ran his hand over the board that way." (indicating.)

What the witness indicated, in describing the manner in which the foreman drew his finger across the board, does not appear in the record, hence it is meaningless to this court. However, the Industrial Board did see this gesture, and for aught that the record discloses, may have attached some significance to it in arriving at its conclusion.

From a careful examination of the entire record we are constrained to hold that there is some evidence contained therein from which it may be reasonably inferred that the deceased, at the time of the injury, was engaged in the course of his employment. In arriving at this conclusion we are not unmindful of the fact that there was a great amount of countervailing evidence submitted on behalf of the appellant, who presented the greater number of witnesses, the testimony of whom is, in many respects, far more plausible than that of Bykowsky, whose testimony was rendered more or less unreliable by reason of his admissions and conflicting statements. These latter, however, are merely elements of credibility, and even though from an examination of the record it is apparent that the Industrial Board in arriving at its conclusion attached undue weight to testimony tainted with

circumstances of suspicion, yet in view of the fact that the legislature has conferred upon said board the sole right to pass upon questions of fact and the credibility of witnesses, we are powerless to disturb its finding.

We are therefore of the opinion that the Circuit court did not err in quashing the writ of certiorari and in dismissing appellant's petition, and its judgment is therefore affirmed.

AFFIRMED.

circumstances it was a fact, yet in view of the fact that the
legislature has conferred upon said board the sole right to
pass upon questions of fact and the expediency of licensing,
we are powerless to disturb its findings.

We are therefore of the opinion that the circuit
court did not err in granting the writ of certiorari and in
dismissing appellant's petition, and its judgment is there-
fore affirmed.

WITNESSETH.

203 I.A. 433

THE PEOPLE OF THE STATE OF
ILLINOIS ex rel. James J.
Brady, as Auditor of Public
Accounts,

Appellee,

vs.

LA SALLE STREET TRUST &
SAVINGS BANK et al.

In re Intervening Petition
of WEXFORD COMPANY, a cor-
poration,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This appeal brings before us for review an order dismissing for want of equity an intervening petition filed by appellant, hereinafter designated as the petitioner, in a suit brought by the relator to dissolve the La Salle Street Trust & Savings Bank, hereinafter referred to as the bank, and for the appointment of a receiver therefor. To this petition the receiver, who was made respondent, filed an answer.

From the decree of dissolution which is contained in the transcript of record, it appears that the court found the bank ceased doing business on June 11, 1914; that the bank on said date was, and ever since has been, insolvent, and that its assets were insufficient to discharge its entire liabilities to its creditors; and directed that the assets be converted into money and the proceeds thereof, after payment of the costs of suit and expenses of the receivership, be distributed among the creditors of the bank according to their respective rights as the same should be

made to appear.

The intervening petition alleged and the respondent's answer admitted, inter alia, the following facts: that at the date of the closing of the bank, petitioner owed it \$5,000 on its promissory note; that since the closing of the bank the money on deposit to the credit of the petitioner aggregating \$3,850.75, had been applied on said note of \$5,000, leaving a balance due from petitioner thereon of \$1,149.25, with accrued interest; that the Boulevard Cafe Company, a corporation, also had on deposit in the bank at the date of its closing, the sum of \$6,217.29, which it had assigned to the receiver of the bank as collateral security for the balance due it from the petitioner on said promissory note for \$5,000, and that at the time of filing the intervening petition the said receiver held said account of the Boulevard Cafe Company as such.

The petition further alleged that the Boulevard Cafe Company, on the date of the closing of the bank, owed the petitioner a sum in excess of \$6,217.29, and that it assigned said deposit account in the bank to the petitioner, which assignment was of record on the books of the bank, subject to the prior assignment to the receiver as collateral security for the balance of petitioner's note of \$5,000; that the said Boulevard Cafe Company was almost entirely owned by the petitioner; that it occupied the building owned by the petitioner and had the same officers and was operated in conjunction with the petitioner; all of which was neither admitted nor denied in respondent's answer, but strict proof thereof demanded.

The petition prayed that an order be entered

authorizing and directing the receiver to credit the Boulevard Cafe Company deposit account pro tanto as an off-set upon the balance due on said \$5,000 note; to cancel the former assignment and carry the balance thereof to the credit of the petitioner on the books of the bank, subject to the result of the receivership and the further order of the court.

On the hearing the petitioner offered no evidence, but counsel stated he had a witness, then said to be absent from the city, by whom he desired to prove certain facts alleged in the petition and not admitted by the answer. The court thereupon dismissed the petition, and in doing so, stated that in view of the pleadings it did not regard the proposed testimony as material.

It is now contended by the petitioner, that the court erred in not taking into consideration the facts which counsel stated he desired to prove by the absent witness.

Proof of the material allegations of the petition not admitted by the answer was indispensable. The petitioner having failed to make such necessary proof, and no application for continuance having been made for the purpose of producing the witness in question, there is nothing in the record from which we can say that the court erred in dismissing the petition. The order of dismissal will therefore be affirmed.

AFFIRMED.

570 - 21968

WHITE OAK COAL COMPANY,
a corporation,

Appellee,

vs.

WILLIAM FOSTER BURNS and
MRS. MARY F. BURNS,
Appellants.

203 I.A. 434

APPEAL FROM

COUNTY COURT,
COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This action was brought in assumpsit against William Foster Burns and Mary F. Burns jointly. The jury found the issues for the plaintiff and judgment was entered thereon against both defendants, from which this appeal has been prosecuted.

The bill of exceptions having been stricken from the record on motion of appellee, there remains for our consideration only such points as are presented for review on the common law record.

It is contended that the court erred in entering judgment against both defendants.

The record shows that no service was had on the defendant William Foster Burns, and his appearance was not entered at any time, except as agent for Mary F. Burns. And while this is not denied by appellee, yet the point is made that the record contains evidence of conduct on the part of defendant William Foster Burns, which constituted an appearance on his behalf. In support thereof appellee directs our attention to the order denying the motion to file an additional plea, which order recites that the

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1. NAME: JAMES EARL RAY
2. BIRTH: JAN. 5, 1924
3. PLACE OF BIRTH: JACKSON, MISSISSIPPI
4. OCCUPATION: LAWYER
5. EDUCATION: B.S. IN LAW, UNIVERSITY OF MISSISSIPPI
6. MARITAL STATUS: SINGLE
7. RELIGION: METHODIST
8. POLITICAL AFFILIATION: DEMOCRAT
9. CRIMINAL RECORD: NO
10. CURRENT RESIDENCE: MEMPHIS, TENNESSEE
11. EMPLOYER: FIRM OF HIS OWN
12. SOCIAL SECURITY NUMBER: 44-388610000
13. DRIVER'S LICENSE: YES
14. PASSPORT: YES
15. VISA: YES
16. ENTRY DATE: JAN. 1, 1968
17. ENTRY POINT: NEW YORK
18. AGENCY: NEW YORK
19. OFFICER: J. EDGAR HOOVER
20. SIGNATURE: J. EDGAR HOOVER
21. DATE: JAN. 1, 1968
22. OFFICE: NEW YORK
23. TELEPHONE: 212-637-1234
24. FAX: 212-637-1234
25. E-MAIL: J.EDGAR.HOOVER@FBI.GOV
26. WEBSITE: FBI.GOV
27. ADDRESS: 400 MARYLAND AVENUE, N.W., WASHINGTON, D.C. 20535
28. PHONE: 202-452-5000
29. FAX: 202-452-5000
30. E-MAIL: J.EDGAR.HOOVER@FBI.GOV
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УГОДЬ О МЕЖДУНАРОДНОМ СОТРУДНИЧЕСТВЕ В РАЙОНЕ

Page 10 of 10

THE ST. LOUIS POST-DEMOCRAT, 227 NORTH SECOND STREET, ST. LOUIS, MO. 63102

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The bill of exchange having been received

1. The following information is being furnished to you for your information:

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$$y_2 = \frac{1}{2} e^{-\frac{1}{2}x} \left(\cos \frac{\sqrt{3}}{2} x - \sin \frac{\sqrt{3}}{2} x \right) \quad \text{for } x \in (-\infty, \infty).$$

...and the ...

DATE OF DEATH: 11/11/1918

motion was made by the defendants, and argues that such recital must prevail over other inconsistent parts of the record. Under such circumstances, the word "defendants" contained in said order included only such defendants as had been served or had entered their appearance. (Correll v. Greider, 245 Ill. 378.) From a careful examination of the entire record, we are of the opinion that the defendant, William Foster Burns, was not properly before the court as a defendant in this case, and hence a valid judgment could not be entered against him.

It is a well settled rule, that where defendants are sued jointly, a judgment which is void as to one is void as to all. Clafflin et al. v. Dunne, 129 Ill. 241; Orrell v. Snyder, 174 Ill. App. 239.

The judgment must therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

motion was made by the defendant, and argues that such
 record must prevail over other inconsistent parts of the
 record. Under such circumstances, the said defendant
 contained in said order should be set aside and a new
 had been made or had entered their statement. (People
v. Greider, 144 Cal. 498.) From a careful examination of
 the entire record, we are of the opinion that the defendant,
William Foster James, was not properly before the court on
 a defendant in this case, and hence a valid statement could
 not be entered against him.

It is a well settled rule, that where a statement
 are made jointly, a statement made by one of them is valid
 as to all. (People v. Greider, 144 Cal. 498; People
v. Greider, 144 Cal. 498.)
 The defendant was not to be removed and was
 could be removed.

Very truly yours,

203 I.A. 439

MARY KITTIER, As Administratrix
of the Estate of Charles P.
Kittier, Deceased,

Appellee,

vs.

CHICAGO & WESTERN INDIANA RAILROAD
COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

This was an action in case against the Chicago & Western Indiana Railroad Co., Chesapeake & Ohio Railway Co. of Indiana, (hereinafter known as the "C. & O.") and Chicago City Railway Co. (hereinafter known as the "C. C. Ry. Co.") to recover \$10,000 damages for the alleged wrongful killing of Charles P. Kittier, deceased. There was a trial by jury, resulting in a verdict finding the C. & O. and the C. C. Ry. Co., respectively, not guilty and finding the Western Indiana Railroad Co. (hereinafter known as the "Western Indiana") guilty, and assessing plaintiff's damages at \$10,000. Motions for a new trial and in arrest of judgment were overruled and judgment entered on the verdict. The Western Indiana appeals.

The Western Indiana urges as grounds for reversal in this case that (a) there was no evidence of any negligence on its part, (b) its negligence, if any, was not the proximate cause of the accident, (c) deceased was guilty of contributory negligence, (d) the jury were improperly instructed, (e) and each count of the declaration shows inconsistent causes of action.

084 A1202

KARY KIRBY, a resident of
 1000 N. 10th St., Seattle, Wash.
 was arrested by Seattle police
 officers on Tuesday.

[illegible]

CHICAGO
COMPANY
JAN 1940

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of action.

At the time in question, the Western Indiana owned four tracks of railroad intersecting, in an easterly and westerly direction, certain street car tracks on Cottage Grove Ave. owned and operated by the C. C. Ry. Co. In regard to the respective location of the Western Indiana's tracks, the first, commencing at the north, was used for west bound freight, the second for east bound freight, the third for west bound passenger and the fourth for east bound passenger. About 45 feet south of these tracks were two tracks of the "Rock Island" Ry. Co. On the east side of Cottage Grove Ave. about 12 feet south of the Western Indiana's tracks and between same and the Rock Island tracks, stood a tower house, and a short distance to the north thereof, a "policeman's shanty". A gateman employed by the Western Indiana was stationed in the tower house. Ten feet to the north of the Western Indiana's tracks, and again ten feet to the south of the Rock Island tracks, gates, operated from said tower house, were maintained by the former company. The gateman stood within the tower house, on a floor elevated about 16 feet above the street's surface, from which he gave warning to persons and vehicles in that vicinity, of the approach of trains, by lowering said gates, and by ringing a bell placed in the tower house for that purpose. East of Cottage Grove Ave. and parallel therewith were the north and south bound tracks of the Ill. Cent. R. R. Co., and east of the latter's right of way, the Western Indiana's tracks slightly curved in a northerly direction. The north bound street cars on Cottage Grove Ave. ran on the east tracks and the south bound cars on the west tracks in said street. The C. & O. was accustomed to operate its trains on the Western Indiana's tracks. The accident in question happened about 7:45 P. M. on April 28, 1913. A freight train consisting of 40 to 60 cars, was slowly moving eastward (on the Western Indiana's

second track from the north) across Cottage Grove Ave. The gates, north and south, were down. Two street cars stood at the north gates waiting to continue south, and the evidence tended to show that two north bound street cars similarly stood immediately south of the south gates. While the east bound freight train was passing over the crossing, the gateman received a signal from the tower man at Pullman Junction, a mile to the east, that a C. & O. passenger train was approaching on the track immediately south of the track upon which the east bound freight train was moving. One or two minutes after the gateman had received such signal, the rear of the freight train passed beyond the east line of Cottage Grove Ave. and thereupon the gateman raised the gates, and at the same time saw the on-coming headlight of the passenger engine east of the Ill. Cent. tracks, approaching at a speed which he estimated at 25 to 30 miles an hour. When the gates were opened, the first south bound car, and, the evidence tended to show, two north bound cars, passed over the railroad crossing in safety. There is some conflict in the evidence as to whether the car which was struck was the next to follow the first south bound car. There is also a conflict as to whether the conductor of the car that was struck preceded, or ran along side of, said car, but the evidence fairly tends to show that the conductor walked ahead of his car, and that it next followed the first south bound car. It was probably two or three minutes after the gateman learned that the passenger train was approaching when he raised the gates. The evidence also tends to show that the conductor, while standing a short distance to the south of the tower house, signalled his motorman to proceed south with his car, after the gates had been raised and the first south bound car had passed safely over the crossing. The engineer of the passenger

second track from the north) across College Grove Ave. It
 gates, north and south, were down. The street cars at
 at the north gate, waiting to cross the street, and the street
 cars from the south gate, were almost entirely
 stood immediately west of the north gate. This in fact
 bound them from passing over the crossing, to pass-
 way received a signal from the tower man at Union Junction,
 a mile to the west, that a passenger train was
 approaching on the track immediately west of the track upon
 which the east bound freight train was standing. Two or three
 minutes after the station man at Union Junction, the tower
 of the freight train, called the attention of the
 Grove Ave. stationer, the stationer called to the
 the same time the on-coming freight train of the
 engine east of the 11. street, and proceeded on a track
 which he estimated it to be a mile or more. When it
 were opened, the street car, and the freight
 tended to show, two north bound street cars, and the freight
 crossing in safety. There is some conflict in the evidence
 as to whether the freight train was a passenger train or a
 the first north bound train. There is also conflict as to
 whether the freight train was a passenger train or a
 train, and if so, whether it was a passenger train or a
 show that the freight train was a passenger train, and that it
 next freight train, and that it was a passenger train.
 two or three minutes after the freight train was
 passenger train, and that it was a passenger train.
 evidence also shows that the freight train, while standing
 a short distance to the north of the 11. street, was
 his statement to proceed with water, and that the freight
 had been raised and the first freight train, and that
 safety over the crossing. The engineer of the passenger

train did not see the car which was struck until the front of his engine was 50 to 75 feet east of Cottage Grove Ave. and until said car was within 10 to 15 feet north of the track upon which his train was running. The car that was struck was on the west track of Cottage Grove Ave. and it was not until the second north bound car on the east track passed beyond his vision to the north that he saw deceased's car, which then had almost reached the north rail of the track upon which the passenger train was approaching. At that moment the engineer reversed the power of his engine and applied the brakes, but too late to avoid striking the south bound car, resulting in the instant death of the motorman. The night in question was clear, and the gateman, from his position in the tower house, was enabled to watch the movements of the approaching trains. He testified, that after the passenger train had crossed the Ill. Cent. Tracks, 88 yards east of Cottage Grove Ave., he rang the tower bell, lowered the gates to the south, and then, as he turned to lower the north gates was prevented from doing so because the car^{that}/was struck, (which he claimed to be the third car which attempted to proceed south) was under the gates. The evidence tends to show, however, that the motorman started his car forward while the gates were raised, and upon a signal from his conductor. The evidence not only tends to show that the gateman was negligent in raising the gates at a time when he saw the headlight of the engine rapidly approaching the crossing, but that such negligence was the proximate cause of the accident, even if deceased's conductor was also guilty of negligence. "Negligence may be the proximate cause of an injury of which it is not the sole cause. If the appellant's negligence concurred with some other event, other than appellee's fault, to produce the

injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the appellant is responsible even though its negligent act was not the nearest cause in order of time." C. & A. R. R. Co. v. Averill, 224 Ill. 516, 520-1, and cases therein cited.

It is a legitimate inference from all of the evidence that the accident would not have happened if the gateman had not raised the gates at the time in question. As said in Heiting v. C. R. I. & P. Ry. Co., 252 Ill. 466, "In the similar case of Hayes v. Michigan Central Railroad Co., 111 U. S. 223, the court, in discussing the very question now under consideration, said: 'It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as a cause of the injury. In the sense of an efficient cause, causa causans, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it causa sine qua non? - a cause which, if it had not existed, the injury would not have taken place, - an occasional cause? And that is a question of fact, unless the causal connection is evidently not proximate.' (Milwaukee & St. Paul Railroad Co. v. Kellogg, 94 U. S. 469)."

We are also of opinion that the evidence fairly tends to show that the deceased at and before the time in question, was in the exercise of reasonable care for his own safety. It is true, as contended by the Western Indiana's counsel, that he did not have the right to rely solely upon the direction given him by his conductor to start his car, and was bound to use a degree of care proportionate to the danger. It is also true, however, that "anticipation

of negligence in others is not a duty which the law imposes." C. C. Ry. Co. v. Fennimore, 199 Ill. 9. It seems evident that he could not have seen the approaching passenger engine until it emerged from the rear of the slowly moving east bound freight train. It is also evident that while attempting to run his car over the crossing his view to the east may well have been obstructed by the north bound street car, which the evidence tends to show narrowly escaped being struck by the passenger engine. When the gateman raised the north gates, it was an implied invitation from him to deceased to proceed to cross the Western Indiana's tracks, (G. & A. N. R. Co. v. McDennell, 194 Ill. 82). In considering further that in attempting to move his car over the crossing he was obeying the order of his conductor, it seems manifest under all the facts and circumstances in evidence, that the jury were warranted in finding that deceased was not guilty of contributory negligence.

The Western Indiana's counsel assigns as error the refusal of the trial court to give certain instructions tendered on behalf of appellant. The first refused instruction complained of sets forth that the defenses of assumed risk, fellow servant, and contributory negligence could not be availed of by the defendant C. C. Ry. Co., because it had elected not to come under the provisions of the Workmen's Compensation Act. As there was no intimation, either in any given instruction or otherwise, so far as the record discloses, that any of said defenses were not available to the Western Indiana, the refusal of such instruction did not constitute reversible error. The other refused instructions were upon the subject of contributory negligence and were fully covered by given instructions tendered by the latter Co. Furthermore, said refused instructions were either erroneous or contained only

of negligence in others is not a duty which the law imposes.
G. C. v. Hammond, 194 Ill. 2. It seems evident
that he could not have seen the approaching passenger engine
until it emerged from the rear of the closely moving east
bound freight train. It is also evident that while attempt-
ing to turn his car over the approaching his view to the east was
well have been obstructed by the north bound street car, which
the evidence tends to show was only a second behind the
passenger engine. When the defendant raised the north gate,
it was an implied invitation for him to descend as he proceeded
to cross the "Western Indiana" track, (G. C. v. Hammond,
194 Ill. 2). In so doing further than in
attempting to move his car over the crossing he was obeying the
order of his conductor. It seems manifest under all the facts
and circumstances in evidence, that the jury were warranted
in finding that the use of contributory neg-
ligence.

The Western Indiana railroad assigning an error the
refusal of the trial court to give certain instructions requested
on behalf of appellant. The first refused instruction complain-
ed of sets forth that the defense of accident, when
arrest, and contributory negligence could not be availed of
by the defendant G. C. v. Hammond, 194 Ill. 2. It is noted that
there was no instruction, either in any of the instructions or
otherwise, so that the record discloses that the jury of said
between was not available to the Western Indiana, the
refusal of each instruction did not constitute reversible
error. The other refused instructions were in the nature
of contributory negligence and were fully covered by other
instructions tendered by the defense. The Western Indiana
refused instructions were either erroneous or contained only

abstract propositions of law.

It is also urged that the trial court erred in overruling the Western Indiana's motion in arrest of judgment, upon the ground that appellee's declaration and each count thereof stated two separate causes of action, one of which was against the defendant, C. C. Ry. Co., solely under the Workmen's Compensation Act, and the other of which was against the Western Indiana and the C. & O. under the Death by Wrongful Act statute. The verdict and judgment are against the Western Indiana only, and it is not contended, as to it, that the allegations of the declaration are not sufficient. The question as to whether a judgment could be sustained against the other defendants, or either of them, upon this declaration, is not presented on this record. In our opinion the Western Indiana has had a fair trial, free from prejudicial error, the verdict of the jury is warranted by the evidence, and the judgment of the Superior Court should therefore be affirmed.

AFFIRMED.

SARAH LEVITAN.

Appellee.

vs.

CHICAGO CITY RAILWAY
COMPANY,

Appellant.

203 I.A. 441

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

STATEMENT OF FACTS. Appellee, while a

passenger on a street car owned and operated by The Chicago City Railway Company, was injured by reason of said car colliding with a passenger train operated by the Chesapeake & Ohio R. R. Co., while the street car was moving over the grade crossing of the tracks of the Chicago & Western Indiana R. R. Co. on which the Chesapeake & Ohio R. R. Co. at that time ran its trains. An action for damages for said injuries was commenced by appellee against the foregoing companies and the Calumet & South Chicago Ry. Co. Suit was dismissed as to the Chesapeake & Ohio R. R. Co. There was a trial by jury and a verdict finding the Calumet & South Chicago Ry. Co. not guilty and the remaining defendants guilty and assessing plaintiff's damages at \$10,000. This is the separate appeal of The Chicago City Ry. Co. to review the correctness of that judgment. For a more detailed statement of facts as to the happening of the accident reference may be had to the case of Mary Kittler, Admx. v. C. & O. R. R. Co., #21803, opinion filed this day, which case arose out of the same occurrence. The evidence bearing on appellant's negligence in that case differs in some respects from that in the instant case, but this decision is not

203 I.A. 441

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passenger on a street car owned and operated by the Chicago
City Railway Company, was injured by reason of said car
colliding with a passenger train owned by the Chicago &
North Western Railway Company, while the street car was moving over the
grade crossing of the Chicago & North Western Railway
at Chicago, Illinois, on which the Chicago & North Western
time ran its train. A number of persons were injured
and the damage to the street car was considerable.
and the damage to the street car was considerable.
us to the Chicago & North Western Railway Company.
jury and a verdict finding the Chicago & North Western
Company not guilty and the street car company liable.
assessing plaintiff's damages. The jury found in favor
separate award of \$10,000 to the Chicago & North Western
corporation of the Chicago & North Western Railway Company.
ment of the street car by the Chicago & North Western
may be had in the case of City of Chicago, Plaintiff, vs. Chicago &
North Western Railway Company, Defendant, No. 10,000, Chicago
City & County, Illinois, and the Chicago & North Western
Railway Company, Defendant, No. 10,000, Chicago City & County,
Illinois, and the Chicago & North Western Railway Company,
Defendant, No. 10,000, Chicago City & County, Illinois.

based on the question of appellant's negligence.

MR. JUSTICE MCGOERTY DELIVERED THE OPINION OF THE COURT.

[It ^{was} ^{defendant} urged by ~~appellant~~ that the trial court erred in giving the following instruction;

"The plaintiff is not bound to prove her case beyond a reasonable doubt, but is only bound to prove it by the preponderance of the evidence. The court instructs the jury that while, as a matter of law, the burden of proof is upon the plaintiff, and it is for her to prove her case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in her favor, although but slightly, it would be sufficient for the jury to find the issues in her favor."

~~It is insisted that this instruction left it to the jury to determine what constituted "plaintiff's case", regardless of whether that case was alleged in the declaration or not. A like objection to a similar instruction in the case of C. C. Ry. Co. v. Nelson, 315 Ill. 436, was held to be without substantial merit.~~

~~It is~~ also urged that the court erred in giving the following instruction as to the measure of damages:

"If from the evidence and under the instructions of the court the jury find for the plaintiff then the jury will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should take into consideration all the facts and circumstances as shown by the evidence before them, the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence to be the direct result of the alleged accident, her suffering, if any, resulting from such physical injuries, if any, and such future suffering, if any, as the jury may believe from the evidence she has sustained or will sustain by reason of such injuries; her loss of time and inability to work, if any, on account of such injuries, and the jury may find for her such sum as they believe from the evidence and under the instructions of the court will be fair compensation for such injuries, if any, so far as such damages and injuries, if any, are alleged in the declaration and proved on the trial, and it is not necessary that any witness should express an opinion as to the amount of such damages."

The first criticism of this instruction is that it should

based on the question of racial prejudice.

MR. JUSTICE: I shall now turn to the question of the burden of proof.

It is a well-known principle of law that the burden of proof is on the party who asserts a fact.

There is no question as to the burden of proof in this case.

The question is not as to the burden of proof, but as to the evidence. The court is of the opinion that the evidence is sufficient to establish the fact of racial prejudice. The court is of the opinion that the evidence is sufficient to establish the fact of racial prejudice. The court is of the opinion that the evidence is sufficient to establish the fact of racial prejudice.

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have limited the jury to a consideration of the evidence as to damages and not have authorized them to consider "all of the facts and circumstances as shown by the evidence before them." In the case of Garney v. Marquette Coal Mining Co., 260 Ill. 230, a similar expression was held to be inaccurate, but not misleading in that case. But when the damages are very high and apparently excessive, as in this case the use of such expression has usually been considered reversible error. (Pate v. Blair Big Muddy Coal Co., 158 Ill. App. 578, and cases therein cited.) One of the elements of damages enumerated in said instruction was appellee's loss of time on account of her injuries. She testified that before the accident she was a dressmaker and employed others to assist her in that work. There was no evidence offered as to the value of her services in the conduct of her business prior to her injury. She testified "I made \$20 to \$25 and \$40 a week above my expenses, during the season." The extent of her recovery upon this ground would be what her services were worth in the conduct of such business as she was engaged in, (C. C. Ry. Co. v. Flynn, 131 Ill. App. 503), and in the absence of more specific evidence as to the value of such services, it was misleading and prejudicial to instruct the jury that it was not necessary "that any witness should express an opinion as to the amount of such damages." Lyman v. C. C. Ry. Co., 176 Ill. App. 27.

Three other instructions, numbered 14, 15 and 16, given at the instance of appellant's co-defendant, were manifestly prejudicial to appellant and should not for that reason have been given in the form presented. Each directed a verdict for said co-defendant, the Western Indiana Co., if the jury found it was not negligent in certain respects specified therein. But each was prefaced with conditions

upon finding a certain state of facts pertaining wholly to appellant and in no way connected with the conditions upon which the verdict was directed. There was no logical connection between the conditions pertaining to appellant and a directed verdict as to its co-defendant, and they were apparently inserted for the purpose of intimating grounds upon which appellant might be found guilty, even if its co-defendant was discharged. While we do not say that the prejudice of itself constitutes ground for reversal in the present case, we cannot countenance this form of instruction.

The other alleged errors are not likely to arise on another trial and therefore need not be considered. Because of the reasons herein stated the judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

501 - 21899

SARAH LEVITAN,
Appellee,

vs.

CHICAGO & WESTERN INDIANA
RAILROAD COMPANY,
Appellant.

203 I.A. 444

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with #21888. There were two defendants, appellant and the Chicago City Railway Company. The judgment has this day been reversed and the cause remanded for a new trial as to the Chicago City Railway Co. in case No. 21888, which necessitates the same action with respect to appellant.

REVERSED AND REMANDED.

444 .A.I.809

501 - 2184

SAVAN LEVIN, (office)

SAVAN LEVIN

SAVAN

COPIES

SAVAN LEVIN, (office)

MR. J. H. LEVIN, (office)

This case was considered for hearing with
#51802. It is noted that the hearing was held
Chicago - 1st January 1934. It was held
day been received by the Chicago office for a hearing
as to the Chicago office. It was held
which means that the case is being referred to
appealant.

SAVAN LEVIN, (office)

203 I.A. 455

EMILY SCOTT,
Appellee,

vs.

UNITED ORDER OF FORESTERS,
Appellant.

APPEAL FROM

COUNTY COURT,

COCK COUNTY.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This suit was brought by Emily Scott against the United Order of Foresters on a certificate of membership in that organization to recover the sum of \$1000 on account of the death of her husband, Alexander Scott. Several pleas were interposed by the defendant company upon which issue was joined, and the case tried by jury. The verdict was for the plaintiff fixing her damages at \$1045, upon which the court after overruling defendant's motion for a new trial, and after plaintiff consented to a remittitur of \$45, entered a judgment for \$1000. Defendant appeals. There was evidence tending to show that Scott's death was caused by chronic alcoholism, although plaintiff and her mother testified that deceased did not take alcoholic drink for about five months immediately preceding his death. The benefit certificate in question was delivered by defendant to deceased Aug. 2, 1900, and provided, among other conditions, the applicant had assented to the "laws prescribed from time to time by the Supreme Court of the United Order of Foresters" and that they were made a part of the contract. At the time of Scott's death, July 31, 1914, there was in force and effect the following by-law adopted by defendant

2081.A.455

607 - 32005

UNITED STATES OF AMERICA
vs.
WILLIAM J. BROWN, Jr.
Defendant.

THE UNITED STATES OF AMERICA, by and through the undersigned

This bill was returned by the undersigned
United States of America on a certificate of arrest
in that jurisdiction to recover the sum of \$1000 on account
of the debt of the defendant, James Brown, Jr., who
was indebted to the United States of America, which
issue was made, and the sum of \$1000, the value of
was for the defendant's debt to the United States of America,
which the court was authorized to return to the
new trial, and the sum of \$1000, which was
of \$1000, and the sum of \$1000, and the sum of \$1000,
There was a return of the bill to the United States of America,
concerning the defendant's debt to the United States of America,
which was returned to the United States of America, and the sum of \$1000,
for the sum of \$1000, and the sum of \$1000, and the sum of \$1000,
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debt of \$1000, and the sum of \$1000, and the sum of \$1000,
The return of the bill to the United States of America, and the sum of \$1000,
to the United States of America, and the sum of \$1000,
foregoing and the sum of \$1000, and the sum of \$1000,
at the sum of \$1000, and the sum of \$1000, and the sum of \$1000,
force and effect the following bill was returned by the undersigned

in July, 1910:

"No member of the Order entering or participating in any unlawful or foolhardy undertaking or being guilty of intemperate or immoral conduct, shall be entitled to receive any benefit from the Supreme Court, or from any High Court or from any Subordinate Court, for any injury or illness which may be directly or indirectly caused by such undertaking or conduct; and should his death be caused, directly or indirectly, by such unlawful or foolhardy undertaking, or by such intemperate or immoral conduct, or should his death occur while he is intoxicated, his benefit certificate shall lapse, become null and void, and no part thereof shall be paid to him or his beneficiaries."

The main question presented for our determination is - was deceased bound by this by-law, which was passed nearly ten years after the benefit certificate had been issued to him? If a contract of insurance is susceptible of two interpretations, courts will adopt the one which is most favorable to the assured. Switchmen's Union v. Colehouse, 227 Ill. 561; Terwilliger v. Masonic Accident Ass'n, 197 Ill. 9. It is only when a member in express terms agrees to be bound by constitutional amendments or by-laws as may thereafter be enacted that he is bound by future amendments or by-laws which impair the obligations of his contract injuriously. Covenant Mutual Life Ass'n v. Kentner, 188 Ill. 431; Baldwin v. Begley, 185 Ill. 180. In the absence of an express agreement the contract of membership cannot be impaired by subsequent changes effected by the association. Peterson, Admx. v. Gibson, 191 Ill. 365.

In the certificate granted by defendant in the instant case there was no express agreement that the assured should be bound by any future rules or laws. It states that certain provisions of the constitution and laws prescribed from time to time "Have been assented to." This may refer to only those then in existence. As said in

Covenant Mut. Life Ins. Ass'n. v. Kentner, supra, "Even if the certificate states that the by-laws are a part of the contract and that they are subject to amendment, subsequent by-laws will be construed to apply only to contracts made after the adoption of such by-laws, in the absence of an agreement that they shall have a retrospective effect. This is upon the principle that all laws and by-laws have a prospective and not a retrospective effect, unless the intent that they shall have a retrospective effect is clear and unmistakable." Applying the foregoing rule to the instant case the clause, "Laws prescribed from time to time" does not, in our opinion, clearly refer to those subsequently enacted. Such a provision should be unequivocal in its terms, as in Baldwin v. Begley, supra, wherein the certificate contained the express condition that the member should comply with the rules then in force, "or that may hereafter be enacted. ***", We are of the opinion that the by-law in question is susceptible of two interpretations and it is therefore our duty to adopt that interpretation which will not impair the indemnity. We hold therefore, that said by-law did not become part of the said contract of insurance, and that deceased was not bound by it. In view of the conclusion arrived at, it is unnecessary to consider other alleged errors assigned by defendant, as it predicated its entire defense upon said by-law. The judgment of the County Court is therefore affirmed.

AFFIRMED.

6203

257
203 I.A. 471

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R H Dm Oct 5 / 16

BE IT REMEMBERED, that afterwards, to-wit: on

MAY 9 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6303.

203 I.A. 471

Harry E. Jarvis, appellee.

vs

Appeal from LaSalle.

G. & J. Coal Company, appellant.

Dibell, P. J.

Harry E. Jarvis brought this suit before a justice of the peace in LaSalle County against G. & J. Coal Company to recover a rental of Fifteen Dollars per year for the years ending July 22, 1913, 1914, and 1915 for certain coal mining rights beneath the surface of certain land pursuant to a written lease. In the circuit court on appeal the case was tried without a jury and plaintiff had a judgment for Forty Five Dollars, from which defendant appeals. No propositions of law were submitted and most of the rulings against appellant upon the admission of evidence are not of controlling importance. There is scarcely any dispute upon the facts.

In the summer of 1906 A. L. Irwin owned certain real estate. In July 1906 he sold about two acres of these lands to Fred Krist. Krist took possession, fenced the land and built a dwelling house on it and moved into it with his wife about October 1906 and remained in possession and ownership till the trial of this case in the circuit court, except as hereinafter stated. Krist finished paying for the land some time later and received a deed from Irwin and about 1912 received another deed to correct a mistake in the first deed. On July 22, 1911 Krist leased to Harry E. Jarvis, E. C. Gnahn and H. S. Alden the right to haul coal and other minerals through all entries passageways and openings in said land, the lease being in duplicate, Krist retaining one and the lessees the other. On May 10, 1913, said three lessees assigned their duplicate of said lease to Wilfred Coal Company. On September 5, 1914,

Harry E. Jarvis, appellee.

Appeal from LaSalle.

vs

G. & J. Coal Company, appellant.

Dibell, P. J.

Harry E. Jarvis brought this suit before a Justice of the peace of LaSalle County against G. & J. Coal Company to recover a rental of fifteen dollars per year for the years ending July 28, 1913, 1914, and 1915 for certain coal mining rights beneath the surface of certain land pursuant to a written lease. In the circuit court on appeal the case was tried without a jury and plaintiff had a judgment for forty five dollars, from which defendant appeals. No propositions of law were submitted and most of the rulings against appellant upon the admission of evidence are not of controlling importance. There is scarcely any dispute upon the facts.

In the summer of 1906 A. L. L. Irwin owned certain real estate. In July 1908 he sold about two acres of these lands to Fred Krist. Krist took possession, fenced the land and built a dwelling house on it and moved into it with his wife about October 1908 and remained in possession and ownership until the trial of this case in the circuit court, except as hereinafter stated. Krist finished paying for the land some time later and received a deed from Irwin and about 1913 received another deed to correct a mistake in the first deed. On July 28, 1911 Krist leased to Harry E. Jarvis, E. G. Cronin and W. F. At the right to haul coal and other minerals through all existing passageways and openings in said land, the lease being in duplicate, Krist retaining one and the lessees the other. On May 10, 1913, said three lessees assigned their duplicate of said lease to Wilfred Coal Company. On September 2, 1914,

Krist and wife conveyed to Harry E. Jarvis all the coal and other minerals underlying the surface of said land with the right to mine and remove the same and to perpetually use the passageways and entryways for all mining purposes in connection with other lands, and particularly for the purpose of conveying coal and other minerals through said passageways and entries and any others which it is desired to construct from other adjacent lands, but without damage to the surface. In said instrument they also conveyed all their rights as lessors in the lease above described. They also executed a separate instrument to Jarvis, in which they assigned to him the rents due the lessors under said lease for the three years ending July 22, 1915. The Wilfred Coal Company changed its name and is now the G. & J. Coal Company, hereinafter called the Company. By an instrument filed for record May 11, 1913, the Company conveyed its property to the Chicago Title & Trust Company to secure certain indebtedness, and among the properties which it conveyed was the leasehold interest of the company, acquired by virtue of said lease from Krist to Jarvis, Gnahn and Allen, and the assignment thereof to the company. The company operates a coal mine close to this land, and one of its main entries or passageways goes under a corner of this land. In 1907 and 1910 Irwin leased certain mining rights under his land to the company. Apparently some company had operated this mine many years before and had passed under the land here in question under some former lease from some other party, but there was no claim that they had any rights which were in existence in 1906, and if they have any rights, not dependent upon the lease from Krist, they were acquired under Irwin.

The principal defense is that the lease from Krist here sued upon is void. The lease in question granted the exclusive right to haul coal, etc. through all entries, passageways and openings

Krist and wife conveyed to Harry E. Jarvis all the coal and other minerals underlying the surface of said land with the right to mine and remove the same and to perpetually use the passageways and entryways for all mining purposes in connection with other lands, and particularly for the purpose of conveying coal and other minerals through said passageways and entries and any others which it is desired to construct from other adjacent lands, but without damage to the surface. In said instrument they also conveyed all their rights as lessors in the lease above described. They also executed a separate instrument to Jarvis, in which they assigned to him the rents due the lessors under said lease for the three years ending July 22, 1915. The Wilfred Coal Company changed its name and is now the G. & J. Coal Company, hereinafter called the Company. By an instrument filed for record May 11, 1915, the Company conveyed its property to the Chicago Title & Trust Company to secure certain indebtedness, and among the properties which it conveyed was the leasehold interest of the company, together by virtue of said lease from Krist to Jarvis, Graham and Allen, and the assignment thereof to the company. The company operates a coal mine close to this land, and one of its main entries or passageways goes under a corner of this land. In 1910 and 1910 Irwin leased certain mining rights under his land to the company. Apparently some company had operated this mine many years before and had passed under the land line in question under some former lease from some other party, but there was no claim that they had any rights which were in existence in 1908, and if they have any rights, not decedent upon his lease from Krist, they were acquired under Irwin.

The principal defense is that the lease from Krist here sued upon is void. The lease in question granted the exclusive right to haul coal, etc., through all entries, passageways and openings

under the following described lands in the Village of Crotty LaSalle County, Illinois, to-wit: That part of the East Half of the North West Quarter of Section Twenty-three in Township Thirty-three North Range Five East of the Third Principal Meridian. lying north of the Chicago, Rock Island & Pacific Railroad right of way, west of Crotty's land, and south of the public highway, except the land heretofore sold to Norcross & Freeman: "Said land for further description being bounded on the north by the Marseilles highway, on the east by Crotty's land, on the west by the Frank Gettler land and on the south by the land heretofore mentioned as sold to Norcross and Freeman." In fact, the words "North west quarter" in said description should have been "North east quarter". That error is in all assignments of this instrument and all references thereto of record, and is supposed to have been in the original contract from Irwin to Krist and in the original deed from Irwin to J. Krist, to correct which Irwin gave Krist another deed about 1912. Irwin did not own any land in the northwest quarter the land he owned being in the northeast quarter. Appellant contends that, because of said mistake, the lease is void, and that neither the assignee of the lessees nor the assignee of the lessors acquired any rights by said assignments. We are of opinion that this position is not tenable. Under these instruments possession was at once taken of the land bounded on the north by the Marseilles highway, on the east by Crotty's land, on the west by the Frank Gettler land and on the south by the lands sold to Norcross and Freeman, and this land was in the Village of Crotty, (now Village of Seneca), in LaSalle County Illinois. These visible monuments furnished a complete and precise description of the land, and Krist took possession under that description, and of course his possession of the surface was also possession of the land underneath the surface,

under the following described lands in the Village of Crotty
 LaSalle County, Illinois, to-wit: That part of the East Half
 of the North West Quarter of Section Twenty-three in Township
 Thirty-three North Range Five East of the Third Principal
 Meridian, lying north of the Chicago, Rock Island & Pacific
 Railroad right of way, west of Crotty's land, and south of the
 public highway, except the land heretofore sold to Norcross &
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 Village of Crotty, (now Village of Geneseo), in LaSalle County
 Illinois. Those visible monuments furnished a complete and
 precise description of the land, and Krist took possession
 under that description, and of course his possession of the
 premises was also possession of the land underneath the surface.

owned by Irwin, from whom he bought it, and this lease constituted a valid grant of those rights under the surface of his land. Irwin granted other leases to the Company of land in the north east quarter after he had sold to Krist, but both these leases were limited to the land which he owned in the north east quarter, and therefore did not purport to convey the small piece of land which he had sold to Krist and of which Krist had taken possession. That possession was just as effective underneath the ground as on the surface and was notice to every one of his rights.

It seems that when Jarvis, Gnahn and Alden acquired this lease they were minority stockholders of the company and were taking the lease for the company, but such internal dissensions had arisen that they feared they would lose their rights in the company and therefore they took the lease to themselves, individually. It seems to be uncertain from the evidence, whether they made the subsequent assignment of their interest as lessees to the company by compulsion of a decree in equity or as a part of a voluntary settlement between themselves and the majority stockholders. They did relinquish all their interests in the Company, and as a part thereof, transferred their lessees' interest under this lease to the company. Afterwards Jarvis purchased the interest of Krist underneath the soil, as before stated, and became the owner of the mining rights and the assignee of the lessor in this lease. Appellant seems to contend that it was a fraudulent practice for Jarvis to buy and enforce the outstanding rentals of the coal mining and mining property underneath this land, after he had left the company. The president of the company as a witness expressed indignation at the conduct of Jarvis, who had ceased to be connected with this company before he purchased these rights from Krist, the lessor. His principal contention seemed to be

owned by Irwin, from whom he bought it, and this lease constituted a valid grant of those rights under the surface of his land. Irwin granted other leases to the Company of land in the north east quarter after he had sold to Krist, but both these leases were limited to the land which he owned in the north east quarter, and therefore did not purport to convey the same piece of land which he had sold to Krist and of which Krist had taken possession. That possession was just as effective underneath the ground as on the surface and was notice to every one of his rights.

It seems that when Jarvis, Graham and Alden deposited this lease they were minority stockholders of the company and were taking the lease for the company, but such internal dissensions had arisen that they feared they would lose their rights in the company and therefore they took the lease to themselves individually. It seems to be uncertain from the evidence whether they made the subsequent assignment of it in interest as leases to the company by compulsion or a device to comply or as a part of a voluntary settlement between themselves and the majority stockholders. They did relinquish all their interests in the Company, and as a part thereof, transferred their leases, interest under this lease to the company. Afterward Jarvis purchased the interest of Krist underneath the well, as before stated, and became the owner of the mining rights and the easings of the lease in this lease. It seems to contend that it was a fraudulent practice for Jarvis to buy and enforce the outstanding rentals of the well mining and mining property underneath this land, after he had left the company. The president of the company as a witness expressed indignation at the conduct of Jarvis, who had ceased to be connected with this company before he purchased these rights from Krist, the lessee. His principal contention seemed to be

that he could have defeated Krist or could have settled with him for some mere nominal consideration, if Jarvis had not intervened. We are of opinion that after Jarvis sold his stock and ~~is~~ left the company, he had a right to buy Krist's mining rights in this land, so far as the evidence in this record discloses, and that the purchase of the lessee's interest by the company and its recognition of its rights as lessee in its trust deed to the Chicago Title & Trust Company, shows that the Company is in under this lease and liable for this rental. By the terms of this lease, as we construe them, the rental was payable in advance, and three annual installments of Fifteen Dollars each were due before this suit was started.

The judgment is therefore affirmed.

that he could have collected Krist or could have settled with him for some mere nominal consideration, if Larvie had not intervened. We are of opinion that after Larvie sold his stock and left the company, he had a right to buy Krist's mining rights in this land, so far as the evidence in this record discloses, and that the purchase of the lessee's interest by the company and its recognition of its rights as lessee in its trust deed to the Chicago Title & Trust Company, shows that the company is in under this lease and liable for this rental. By the terms of this lease, as we construe them, the rental was payable in advance, and three annual installments of fifteen dollars each were due before this suit was started. The judgment is therefore affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

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2027

AT A TERM OF THE APPELLATE COURT,

203 I.A. 495

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R H Dyer

Oct 17 '16

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Begin

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Present

1904

1905

Gen. No. 6287.

George H. B. Allen, Appellant,

-vs-

Jacob H. Schnellbacher,
Appellee.

Carnes, J.

Appellant, Jacob H. Schnellbacher, who owns a
store building in Georgia, Tullahoma, valued at \$10,000, in 1917, he leased the first, second and third floors of the
top rear of the building, for a term of years, at a
rent of \$100 per month, or \$1,200 per year, the
rent to be paid in cash five times a year, to wit: on the
1st of January, 1st of April, 1st of July, 1st of October,
and 1st of December, the first payment to be made on the 1st of
January, 1918. The building was then in a state of
disrepair and in need of repairs. Appellant, Schnellbacher,
a witness introduced by appellee did not state that he
was and was not a broker or real estate dealer, but
a witness introduced by appellee did not state that he
was and was not a broker or real estate dealer, but
a minimum of 25% on business property. The
evidence went out of claiming a commission on the
value of the property in excess of a very long time.
stated that if the appellee wanted to lease the
property the proper charge would be five per cent
of the property. In calculation of the value of the
of money to be paid in the distant future the
consideration, the witness stated that the value of the
other agents did not do simply giving a value of the
on the 1st of January. A computation under the above stated
value in a building then owned of \$700, divided by 100
and one-half per cent. of the value of the building, the
cent. on the value of the building, the value of the building.

2031.A.432

Gen. No. 2328

George H. B. Allen

of the

-v-

George H. B. Allen
Agent

Gaines, J.

Ap. 11, 1901, Gaines, J.

Store building in Gaines, J.

1911, no record of the building.

top west of the building.

weighing in a 100 lb. bag.

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was a part. George A. Sadler, the appellee, claims to have been the agent of appellant in the case. He brought this action of trespass to recover compensation for his services in the case. There is a verdict of \$750.00 for appellee and judgment against appellant on that verdict, from which this writ is prosecuted.

The questions presented are only of fact and conclusions of fact to be drawn from uncontroverted evidence. Appellee was employed on a part for a certain period upon the testimony of appellee, Sadler, the tenant, Kresge, and F. J. Smith, the attorney of appellant in the matter of the case. It is shown that appellee was a real estate broker occupying an office in Peoria with E. L. Thomas, another real estate broker; and that they were not in partnership but, as Thomas said, "he was generally made up deals, he was running one side and I the other." On April 19, 1917, Thomas had been employed by Kresge, who lived at Detroit, in the building in which he had located a business. On that day he wrote to Kresge asking him to open an opening. Thomas was afterwards paid by Kresge for his services in obtaining the lease for the building.

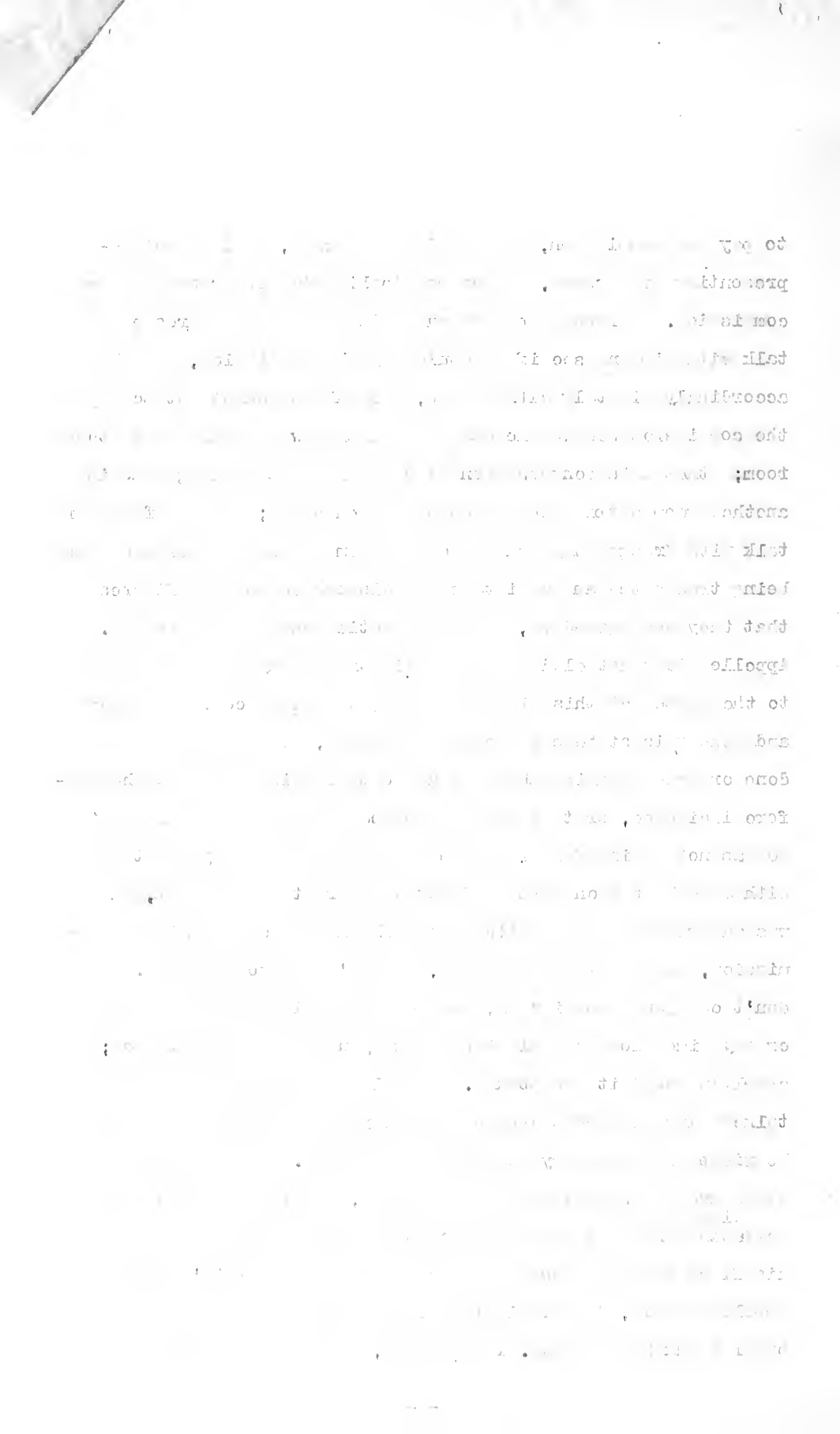
Appellant testified that, after the case was heard between Thomas and Kresge, went to the building and introduced himself to him and asked him to let him have his store for lunch, giving him the address and location of the store, and that he had concluded that he was not going to take it out of his possession and that he was not going to let it. He then showed him the building and the location of the store.

When a person is in a state of mind, it is not possible to know from the outside what is going on in his mind. He knows it himself, and he knows it in a way that is not accessible to others. His knowledge is not a matter of fact, but a matter of feeling. It is a feeling that is not shared by others, and it is a feeling that is not subject to the same laws as the facts of the world. It is a feeling that is not subject to the same laws as the facts of the world. It is a feeling that is not subject to the same laws as the facts of the world.

here. I can do business with him," to which appellee replied: "I will have this information in regard to the sale of the building communicated to him and I will see you again."

There is no claim by appellee that he offered any particular rate at which he would rent the building, or at any specific date anything other than as above stated was said to indicate in what capacity appellee was to act in the matter. He says he there refused to tell appellant who the man was or what the business was. He testifies that following that conversation he told Kresge of the matter, who communicated with Kresge and received a letter back in a few days; that he, appellee, called on Kresge on April 22nd and told him the party wanted more definite information as to the building and appellant took him over the building and said: "I will fix this building any way this man wants it; if he wants metal ceiling, cement floor, I will remodel it as he wants it." That he, appellee, so told Thomas and Thomas furnished the information to Kresge and Kresge came to Georgia April 24th and came to Thomas' office and he, appellee, went with Kresge to the store and introduced the parties and told appellant that Kresge was the man that wanted to rent the store. They arranged to meet in Judge Irwin's office in the afternoon, and did so meet; that Judge Irwin submitted a proposition to Kresge which he at first accepted and he, appellee, then said to Kresge: "It now looks to me as though you were going to make a deal. I want a thorough understanding with you at this time in regard to my commission." He said, "What is your commission?" Kresge said, "The customary commission is 2 1/2 per cent. of the gross amount, and appellant threw out that he didn't think he ought to be paid upon to pay commission; that Kresge agreed to the one that was

[illegible]



about that, and on his answering no said something to the effect, and that appellant called an agent into another room. Irwin was called out for a moment and he was not there. Kresge testified as to the above transaction; appellant testified if he was in the room at that time about commission. He said he would get his commission from the sale of the property. He had no such understanding but when it was necessary for the owner to pay the commission, Kresge, told him that he had better have some understanding about it; appellant also had some conversation with appellant and out of this conversation, as they were leaving the building, told him that he was not willing to pay the commission or a satisfied agent, commission, to him; that Kresge, had told appellant during the conversation in Irwin's office that matter. Appellant was the matter upset he could give him the sum of \$100.00. Appellant told he was entitled to his commission. Kresge told him to go back again and talk the thing over. It appears from the evidence that Kresge at the time did offer to pay the commission, but the offer appellant refused. He thinks it is a fact that appellant at that time told Kresge that he was not willing to pay reasonable commissions. Instead of this, Kresge declined to pay a preferential of the testimony he gave in the trial. There is little or no other evidence in the case. Appellant there expressed willingness to pay reasonable commissions, even though he was not willing to pay a commission may have been a less than the amount of the commission. He had well relied on the testimony of Kresge that he would pay the commission if he could get it upon the same terms. He was from the whole told only that Kresge was not willing to pay. He had been willing to pay the commission if he could get it upon the same terms.

about that, and on his answering he said that he had not
and that he also called apartment 1100 another room and that
Irvine was called out on a phone and heard no more of it. Then
Kearse testified that he was in the room; that he asked ap-
artment 1100 for an apartment where someone was staying and
said he would get his commission for the first night; that
he had no more information but that it was a temporary place
owner to pay the commission, and he, Kearse, told him that he
had better have the commission at that time; that he, Kearse,
some conversation with apartment 1100 and that he, Kearse,
wards, as they were leaving, he said that he, Kearse, told
was not willing to pay the commission and that he, Kearse,
sion, to him; that he, Kearse, told him that he, Kearse,
conversation in the room; that he, Kearse, told him that he, Kearse,
matter must be paid the commission and that he, Kearse, told
he was a little to his commission and that he, Kearse, told
again and told him that he, Kearse, told him that he, Kearse,
that Kearse told him that he, Kearse, told him that he, Kearse,
offer again, he said, that he, Kearse, told him that he, Kearse,
apartment 1100 and that he, Kearse, told him that he, Kearse,
recommends to him, that he, Kearse, told him that he, Kearse,
a recommendation to him, that he, Kearse, told him that he, Kearse,
it, that he, Kearse, told him that he, Kearse, told him that he, Kearse,
apartment 1100 and that he, Kearse, told him that he, Kearse,
mission, even though he, Kearse, told him that he, Kearse,
may have been willing to pay the commission, that he, Kearse,
have well, that he, Kearse, told him that he, Kearse, told him that he, Kearse,
commission and that he, Kearse, told him that he, Kearse, told him that he, Kearse,
from the whole, that he, Kearse, told him that he, Kearse, told him that he, Kearse,
have been willing to pay the commission, that he, Kearse, told him that he, Kearse,

statement of what occurred. . . . the . . .
seems to us much more probable than . . .
the narrations differ. . . . says . . .
told him ~~if~~ he knew of a tenant . . .
that he, . . . inquired who . . .
and spelled could not tell him. . . . told . . .
know- . . . the . . .
business . . . carried on there, . . .
would have to be pretty carefully laid up . . .
he did not . . .
about time to . . .
about the . . . way that . . .
looking . . .
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ing . . .
man with a . . .
or . . .
in the . . . until he spoke to him . . .
Irwin's office. . . .
arrival at Teoria to investigate . . .
him . . .
in reference to . . .
told him. . . .
indicated to . . .
or had any authority to . . .

After a careful examination of . . .
other conclusion than . . .
in our opinion, is so clearly . . .
that it is our duty to reveal . . .

opinion that the verbal contract on the facts of the case
it is a contract which cannot be admitted by the court; and, therefore,
presuming that another trial could be held in the future, the
different evidence as to the facts of the case cannot be admitted.

Binding of Facts: The finding of facts is binding on the court,
or implied, between appellant and respondent, and no other party,
any service to be rendered by the respondent to the appellant, in
relation to the contract, or in connection with the contract, or in
contract, express or implied, by the respondent, or for any service rendered.

opinion that a verdict on the facts contained in
this record and the other facts admitted by the court to show; that the
presuming that nothing could be said in the light of
the facts the case is not a matter of course.

Findings of fact: We find that there was no contract, written
or implied, between appellant and the defendant in the matter to
any extent to be removed by the defendant from the plaintiff's
position to the position of the plaintiff in the matter, and no
contract, express or implied, by the defendant to the plaintiff
for any services rendered.

8297

AT A TERM OF THE APPELLATE COURT,

203 I.A. 496

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

2522

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6297

Adelia Carr, appellee.

203 T. A. 296

vs

Appeal from LaSalle.

Melvin Carr, appellant.

Carnes, J.

Appellee, Adelia Carr, brought this action in forcible detainer against her son, Melvin Carr, the appellant, before a justice of the peace to recover possession of the west half of the northwest quarter of section twenty; and the south twenty acres of the west half of the southwest quarter of section seventeen in township thirty two north, range five east of the third principal meridian, in the town of Brockfield, LaSalle County, Illinois. She recovered a judgment there from which the appellant appealed to the circuit court where it was tried by the judge without a jury who entered a judgment in her favor, from which this appeal is prosecuted and a reversal sought on the ground that the judgment was against the evidence. No holdings of law were submitted and no error in the ruling on evidence is suggested.

It appears that March 16, 1914, a written lease between these parties of the premises was executed for a term expiring March first 1915, containing a covenant that appellant should deliver possession at the termination of the lease; that he did not then deliver possession and this suit was begun by ~~xxxxixxxxx~~ complaint filed three weeks thereafter. (March 23, 1915) Appellant offered proof that at the time of the leasing there was a family understanding that he should remain in possession during the lifetime of his mother and that he supposed the lease was drawn simply to show the terms under which he should continue to hold the property; that he had no knowledge or intimation to the

Gen. No. 6397

Alfred Carr, -berice.

 εv

Meivlin Gert, -epstant.

2. 2000

App-100, Alasia Carr, brought this action in for

detainer against her son, Kevin Carr, the defendant, before

Justice of the Peace to recover or consequent to suit in

half of the northwest quarter of section 3, T. 14 N., R. 10 E., S. 1 E.

South twenty two of 1890 to 1900

of section seventeen in to thirty thirty two north, range five

east of the third principal position, in the town of Brak-

field, LaSalle County, Illinois, and covered a distance of

there from which the agent proceeded to the circuit court

where it was tried by the judge without a jury and instead

a judgment in her favor, from which little more can be learned.

and thought that they had no right to have a

... against the evidence. No one is to be held responsible for the

...the

[illegible]

These writers of 1911 miss an excellent opportunity

- The following information was obtained from the records of the

It should be noted that

100-443887-100

- 1 -

1030 1011 1012 (CHLORIDE) .retire

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he should remain in possession of

mother and father are supposed to be

show the former order

SECRET

contrary until he was served with the summons in this case the day after the complaint was filed; that he had done some work on the premises after the first of March with a view of preparing the land for a crop, and that his brother, who lived across the way from him, knew that he was doing this work with a view to staying on the premises and did not in any way inform him that he could not stay another year; that this brother was acting for his mother when the lease was executed and he supposed he was her attorney in fact to attend to the whole matter, and that notice to him of what he was doing was the same as notice to appellee. Appellee offered evidence denying that any such statements were made as to the permanency of the tenancy, and she herself testified that in the fall of 1914 she told appellant that he was only to stay that year, and she offered in evidence the power of attorney under which her son was acting in adjusting matters at the time the lease was made. The appellant objected to the admission of that document in evidence. Appellee's attorney stated that it was only offered to show or tending to show the circumstances surrounding the execution of the lease and the court sustained the objection, therefore it does not appear that any one other than appellee herself had any authority to make any promises as to anything other than what was contained in the lease, and there is no claim that she made any, and no claim that any were made after the execution of the lease.

The court might well have found that no such promise was made by anybody, or, if such a promise was made, it was by somebody not authorized by appellee to make it, or if made by somebody authorized that it was prior to and contemporaneous with the written instrument and therefore of no avail in this suit; therefore the court is not

contrary will be reserved with the same in the
the day after the complaint was filed; that he and one of
work on the premises after the first of March with a view of
preparing the land for a crop, and that his brother, who lives
across the way from him, knew that he was doing this work
with a view to staying on the premises and was not in any way
inform him that he could not stay another year; but this
brother was acting for his mother when the lease was executed
and he supposed he was her attorney in fact to attend to the
whole matter, and that notice to him of what he was doing
the same as notice to the lessee. A notice offered evidence
tending to show that any such statements were made as to the termi-
nancy of the tenancy, and a notice testified that in
the fall of 1914 and told defendant that he was only to
stay that year, and a notice offered in evidence the power of
attorney under which person was acting in the matter at that
at the time the lease was made. The same notice offered
to the testimony of that document in evidence. A notice
attorney stated that it was on a notice to show or
tending to show the circumstances surrounding the execution of
of the lease and the court questioned the validity of the notice
it does not appear that any one other than a lessee has
had any authority to make any promises as to a farming lease
than what was contained in the lease, and there has no claim
that she made any, and no claim that any one other than
the execution of the lease.

The court might well have found that the lease was
was made by anybody, or, if made, it was made by the lessee,
by somebody not authorized by the lessee to make such a promise
made by somebody other than the lessee, and if it was made by
temporarily with the intention of making a lease for a
no avail in the matter.

disregarding that ground of defense.

The only other question is whether appellee had her right to maintain this action by deferring the beginning of this suit for twenty one days. There is no claim that she did anything in that period to recognize appellant as her tenant or encourage him to do any work on the supposition that he was to remain in possession another year. When appellant held over after the expiration of his written lease without any new agreement he became either a trespasser or a tenant for another year at the election of appellee. If she had done anything to evidence an election to treat him as a tenant for another year she would have been bound by it, but she did not. The mere fact that she took no steps for three weeks ~~did~~ to regain possession does not raise an inference of a new tenancy. (C. & St. L. R. R. Co. v. Virginia Ferry Co. 82 Ill. 230; Condon v. Brockway, 157 Ill. 31; Weber v. Powers 213 Ill. 370)

Portions of the briefs are devoted to the discussion of a family controversy in relation to this and other matters that have no bearing on the issues here. Appellee is advanced in years but so far as this record shows she executed the lease to appellant and thereafter they were each of them bound by its terms precisely as though no family relation or controversy existed. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

6200

2594

AT A TERM OF THE APPELLATE COURT,

203 I.A. 504

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

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the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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THE

BOARD OF DIRECTORS
OF THE
AMERICAN
ASSOCIATION
OF
UNIVERSITIES
AND
COLLEGES
OF
LIBRARIANS
AND
DOCUMENTALISTS
OF
THE
UNITED STATES
OF AMERICA

1917

1917-1918

Gen. No. 6233.

203 I.A. 504

The People, etc.,

Defendant in error,

-vs-

James M. ...
of the ...

Louis Peck,

Plaintiff in error.

Dibell, J.

Louis Peck was indicted by the Grand Jury of DeKalb County on October 31, 1913, for violation of laws relating to anti-saloon territory. The indictment was returned by the Grand Jury of DeKalb County and Peck was thereupon arrested and was convicted under county number of 144. The trial was denied and a motion in arrest of judgment was granted. A judgment against him was filed and he was ordered to abate out of the place described in the 144th county nuisance. Peck has sued out his writ of error and has obtained judgment. He contends that the court erred in its judgment on the testimony and on instruction, and that the court should have set aside the conviction.

Peck formerly was a saloon owner and operated a saloon at No. 123 South California Street in the City of Atlanta, DeKalb County. He and his wife lived on the premises. On May 7, 1914, that day being anti-saloon day, he closed his saloon. After the court rendered its decision on June 11, 1914, in case No. 144, No. 50, concerning the right of women to vote, he sold some soft drink parlor on the same floor, and sold cigars and tobacco. He also sold the same two ...

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formerly been his bartender when he kept the saloon there. He had other business which engaged his attention most of the time, but he was here and conducted the place in person part of the time. It is claimed that intoxicating liquors were there sold after the place became anti-saloon territory, and before the finding of the indictment.

It is argued that the court erred in permitting the legal description of the property where this building stood to be given by parole. We are of opinion that the legal description could be given by any one who knew it, and that it was not necessary to introduce the record. The court permitted witnesses to state that during this period they had seen intoxicated persons come out of this place. We are of opinion that the court did not err in permitting this evidence to be introduced. It tended to show that they had obtained intoxicating liquor at Beck's place; and any witness is competent to express an opinion, if he has one, as to whether another person is intoxicated. *Binicht v. Towns*, 8 Ill. 340; *Ward v. Chicago St. Ry. Co.*, 237 Ill. 633. The defendant introduced in evidence a certified copy of a report made by the revenue collector's office for the district in which the building is situated showing the issue of a special permit, or license, to L. J. Beck to carry on the business of a retail liquor dealer at 125 California Street, O'Connell, for a certain period from July 1, 1914, to June 30, 1915. It is argued that this was incompetent because there was no proof that it was posted in Beck's place of business. This is not so.

is overruled in *People vs Brown*, 275 Ill. 169. The state -
mitte the state to prove that plaintiff in error's full name
is Louis E. Peck, and that he was commonly called E. E. Peck at
Sycamore. It is urged that this was error. Counsel for
plaintiff in error in examining one of his own witnesses called
plaintiff in error E. E. Peck in his question. The court's in-
structions which the court gave at his request permitted plaintiff
in error as E. E. Peck. The contention is without merit. It is
claimed that error was committed by counsel for the plaintiff in
asking Peck on cross examination whether he had violated the law
at any time when it was formerly in force in Sycamore. The court
sustained objections to every such question. It is not clear
it clear that Peck is guilty we think it unnecessary to require
what effect such questions might have in a particular case. Error
is alleged in the ruling of the court which permitted the state
to prove that Peck told a witness that he had sold liquor to
parties named, but that they did not dare ^{to} expose him;
in admitting testimony that Peck tried to prevent the witness
from testifying to the truth on this subject because he was afraid,
and sought to shape his testimony so it would not include
selling of intoxicating liquor. There are no objections to the ruling
was committed by the court in receiving this testimony. It
argued that the court erred in reciting or repeating the testimony in the
presence of the jury various portions of the testimony. This was
cross in this way. Objections were never made to the testimony
on the ground that the evidence was different from what was
recited. In ruling on these objections the court's ruling
stated that he understood the evidence to be concerning the sale of

were contending. This was not erroneous, in the original
correctly stated. *Reich vs People*, 219 Ill. 286. The court's
practice should be sparingly indulged in by the court, but it is
not able to say that the court misstated the law. In fact,
the court only stated the substance, and the objection
had used. But attention is not called to any error in the
objection was made to the course pursued by the court in stating
his view of the evidence on the disputed point. The court
in that respect. The court refused to consider the evidence
that Reich's place was kept in an orderly manner. The statute
makes the sale of intoxicating liquors at retail on anti-
salon territory a nuisance, and a cause of action therefor is
created by also proving that it was quiet and orderly. Moreover,
the plaintiff in error himself testified to the fact that it was
a quiet and orderly place then, and no objection was made to
the contrary.

Such objection is made to the instructions in the case of
People. Many of them are stock instructions, and are correct
before. Some of them are disposed of by *People vs Brown*,
supra. It is contended that the indictment was returned
included one day before the anti-saloon law was adopted in
Sycamore. The statute says that the law shall take effect
on the thirtieth day after the day of its adoption. The law
is adopted. This law was adopted in the year 1914, and
therefore became effective on May 4, 1914. The indictment
in question covered the period after May 6, 1914, to May 10, 1914,
1914, the day when the indictment was returned. The indictment
therefore is not well founded. *People vs Brown*, 12 Ill. App. 2d 100.

not justify a reversal, because no sales of whisky at his bar in that place were proved on these particular days, but sales of sales in June, July, August and September that the instruction No. 10 is objected to, but is sustained by People v. People, 69 Ill. 601, and People v. Brown, supra, holding that the instruction requested by Peck is proper in view of the instructions given at his request.

The proof for the people showed numerous admissions by Peck and his clerks at that place after this anti-liquor law went into effect and before the date when the indictment was returned. It showed admissions by Peck that he had sold whisky to some of these people, coupled with the fact that the people did not date to expose him. It showed that other men, who were drunk men had come from his place and that some of these men had been carried out of the rear of his place and placed in a room near by to sleep off their drunkenness. It showed that people had looked in at the windows of his place and had been drinking from whiskey glasses at the bar. It showed that Peck had sought to intimidate one of these men who was testifying against him on this indictment by offering him money. It showed that he had paid twenty-five dollars to a retail liquor dealer's license from the United States for a period of time. Peck himself testified that he had been in his cellar during this time, and obtained the whisky from the retail liquor dealer's license and carried it to his place and had that liquor in his cellar. The people also showed that his clerks was seen carrying a package of whisky to his cellar and placing them behind the bar, and that the whisky was immediately obtained from the package and sold to the people for whisky which he paid for and drank.

and his clerks denied that they had sold any whiskey to [redacted]. The jury were the judges which set on witnesses to believe have no reason to doubt that they correctly decided [redacted]. The fourteenth count, which was the nuisance count, described place as No. 123 South California street in the city of [redacted], and also described it by the legal description of [redacted]. internal revenue stamp receipt described it as 123 California street, Sycamore, leaving out the word "south". The legal description was duly proved, but several of the witnesses left out the word "south" in naming the street in number. This is a small variance was not suggested in the court below, and there is no proof that there was any other No. 123 California street except 123 South California street, and we find no ground for reversal in that slight difference in the description.

The judgment is affirmed.

125

1. The first group of people who are not in the labor force are those who are not in the labor force for any reason. This group is the largest and is made up of people who are not in the labor force for any reason. This group is the largest and is made up of people who are not in the labor force for any reason.

STATE OF ILLINOIS, {
SECOND DISTRICT. ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

1896

...

1896

1896

625

23

AT A TERM OF THE APPELLATE COURT,

203 I.A. 507

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R H Dec Oct 5/16

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6253

2031A

These Brothers, appellees.

vs

Appeal from Peoria.

Newton Matthews, appellant.

Dibell, J.

These Brothers are in the teaming and transfer business in Peoria. Sharon had a shoe shining parlor standing on a piece of ~~his~~ a lot owned by Matthews. These Brothers moved that building to the street and around the corner and onto the rear of another lot owned by another party. They presented a bill for \$15.00 to Matthews for doing that work, which he refused to pay. These Brothers sued him before justice and had a judgment and he appealed to the circuit court, where the case was tried without a jury and plaintiff had another judgment from which the defendant appeals to this court.

Trussdale, bookkeeper for plaintiff's, testified that he had met defendant on several occasions and knew his voice and that defendant had a conversation with him over the telephone at plaintiff's office, which conversation he detailed. Defendant denied that he ever had a conversation with plaintiff or with Trussdale over the telephone. Defendant insists that that proof has no probative force. Conversations over the telephone have been discussed by our superior courts in *Miller v Anderson*, 153 Ill. 363; *Gellin v New National Bank* 225 Ill. 572; and by this court in *Rogers Gas Co. v Trenton* 183 Ill. App. 533; *Wicks v Wheeler*, 127 Ill. App. 116; *Trapp v Rockford Electric Co.* 180 Ill. App. 579; and *Levy v Estate of Cronin*, 196 Ill. App. There is an instructive discussion of the subject in 1 Chamberlayne on Evidence, Sec. 781. From these and other authorities it is clear that if a witness identifies the voice, the conversation over the phone is admissible, and its force as evidence depends on what is

Gen. No. 6525

These Brothers, &c. &c.

• 920-91 1001 1 3 A

• [unclear] [unclear] nothing

Disposit. 1.

THESE ARE THE RESULTS OF THE INVESTIGATION

in Period. Station No. 1 also showing a floor falling on it.

pieces of it are left out, and the result is a novel that is not a novel.

that building to be placed and removed by means of a crane

[illegible]

netting value for the year of 20.24, is filed as

Page 11 of 11

Page 10

the case of the

At the time of the attack, the defendant was in a state of mind to commit the crime.

It is the responsibility of the individual to ensure that the information is accurate and complete.

THE FOLLOWING INFORMATION IS FOR YOUR INFORMATION ONLY AND IS NOT TO BE USED FOR ANY OTHER PURPOSE.

GROUP 2: 1st and 2nd in rank, both unknown, had their last test

... ..

1047-1968

NOTICE TO THE PUBLIC

On 10/10/2017, I was informed that you had been at the 10/10/2017

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

SECRET, according to JFIRM

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[illegible]

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

10. The following information is for your information:

of the subject in a Chamberlayne or "Gentleman's Magazine" style.

From these two other authorities it is

identify the voice, the content of

... ..

the jury believe the witness. The evidence of a blind man would not be unworthy of belief merely because he identified the speaker by his voice only.

Shahon had this small building at another place. Defendant had a vacant space of about ten feet between certain buildings owned by him, and Shahon wished to locate his building there. He and the defendant had negotiations on that subject and the rent to be paid was agreed upon. According to defendant's testimony, he was waiting to find out just how wide the building was. We think it clear that Shahon thought that defendant had consented to have the building placed on this vacant strip. One of the plaintiffs testified that defendant told him he had consented to let the building be placed there. Defendant did not deny this. Shahon hired plaintiffs to move the building to that spot and they did place it there, and Shahon paid them. After it had been there about three days, defendant wanted it moved away. Shahon testified that defendant told him to have it moved and he would pay the expenses. Truesdale testified that he, as bookkeeper for plaintiffs, received an order over the telephone from defendant to move the building and that he would pay the expenses. One of plaintiffs testified that the defendant said he would pay the expense of moving it the second time. Defendant testified that he never promised to pay the expense of moving the building. The trial judge found that the promise was proved. There were three witnesses against one, and he could not well have found otherwise. That the promise was made and the work was done in reliance thereon, must be considered as proved.

But defendant insists that plaintiffs committed a trespass when they placed that building on his land without his consent and that it was their duty to remove it, and that if he promised to pay for it such promise was without consideration.

We do not assent to the correctness of that proposition as applied to the facts of this case, but it ignores the evidence already referred to that defendant consented to have the building placed on his lot. We hold that the deed shows a sufficient consideration to support the purchase. The rulings of the court upon the propositions of law and fact were in harmony with these views.

The judgment is therefore affirmed.

We do not concede to the correctness of that conclusion
as applied to the facts of this case, but it is not
already related to a defendant's conduct
have the defendant placed on his feet. We hold that the
shows a sufficient consideration to support the verdict. The
evidence of the court upon the production of the evidence
was in her only with these views.
The judgment is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

STATE OF TEXAS

County of _____

and _____

County of _____

6301

2526

AT A TERM OF THE APPELLATE COURT,

203 I.A. 508

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R H Dwyer Oct 17/16

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

AT A COURT OF LAW

Began and continued
in the year
with

Present

the
of

6301.

Union Light Company,
Appellant,

2031 A 508

-vs-

Appellee.

O. F. Morrison,
Appellee.

IT IS ORDERED, J.

The Union Light Company, corporation, doing business in Chicago, hereinafter called appellant, against from Mrs. O. F. Morrison, hereinafter called appellee, an order prepared by appellant, dated September 14, 1913, and signed by appellee, for a case containing various articles, cases, mirrors and other property contained in the order, and candy boxes, to be installed in her home, located in Chicago, Illinois, and to so form to remain clear and unobstructed. Appellant had agreed to appellee's satisfaction, and she was to pay two thousand five hundred dollars, viz., one thousand dollars at the time of signing the order; when appellee on receipt of the goods or bill of lading for the same; and the hundred dollars more between the 6th day of October and the 15th, 1914, and thereafter thirty-seven dollars per month till the five hundred dollars was paid. Thereafter appellee was to execute notes for the remaining amount; chattel mortgage on the property and to insure the property, keep it insured at her expense, making the same payable to appellant as its interest; and, and to deliver the same to appellant. The order provided that the same was to be

in appellant till the chattel mortgage was paid in full or until the purchase money was paid in full. The order was subject to the approval of appellant. Appellant placed a certain place in the order for the soda fountain, and it did not sign the bill until the trial of the merchandise. The order was made, and therefore were not, and were not, by appellee. Appellant manufactured the soda fountain and obtained the rest of the goods ordered. She shipped them to Georgia and they were delivered. Appellant also hundred dollars with the order for the bill of lading before the goods were shipped. Appellant sent men to Georgia to uncrate the goods. As soon as the uncrating began in the store, she declared that the goods were not according to contract. She was assured by the men in charge that they would be according to contract when they were all installed, and on that day she permitted the installation to proceed. After the installation she pointed out no goods in which they did not at all conform to the specifications. At that time she then to ship certain goods back to Chicago, but she said that if they shipped any they would ship all, and she said she would get back the eight hundred dollars. She gave her no satisfaction at all on the goods. She then claimed to have completed the installation, and she executed notes and chattel mortgage. She would not accept the goods, and insisted that the man to whom she had placed the order, should go to Georgia and

in appellant's bill, the amount of \$100.00 was deducted and the bill
or until the payment of money was made in full. The bill was
subject to the approval of appellant. There was a final
certain place in the order of the bill to which, appellant
approved, and it did not state that it was the bill of
trial of the case. The case was not in the
order was made, and therefore was not, and was not
by appellee. Appellant represented the bill of
order was made, and appellant was not, and was not
shipped first to the appellant's bill of the bill of
appellant to the appellant's bill of the bill of
dollars for the bill of the bill of the bill of
Appellant sent him to the bill of the bill of
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was assumed by the bill of the bill of the bill of
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the goods, but this he did not do. After some correspondence formal demand was made upon her in February, 1914, for the notes, chattel mortgage, insurance policies and four hundred dollars, and she declined to comply with the demand, but offered to return the goods upon the return to her of the cost of the goods which she had paid. Thereupon on February 26, 1914, Appellant brought this action of replevin against Appellee for said goods. Appellee gave a forthcoming bond and retained the goods. Appellant filed a declaration of two counts, one for the wrongful taking and detention and the other for the wrongful retention of the goods. The pleadings are not at all correctly drawn as to number, etc. in the District or Circuit. Appellant filed seven original and two additional pleas. All of them except non cepit and non detinet. There is no answer to the first two pleas and it was overruled and special application was filed thereto, and appellant contends that she could not do in overruling the demurrer to one of those pleas, but such objection was waived by replying thereto. Appellee filed as her first additional plea, upon which issue was joined, a plea which states a good defense and is established by the preponderance of the evidence the other pleas need not be considered. In that plea appellee set out the contract and averred that wherein appellant promised appellee that said goods were sold to her for the purpose for which they were sold by appellee, namely, for the purpose of running a soda fountain and the candy store about so described by appellee, and that each of said articles are of first class material and to be of first class material and workmanship in every respect and that she enclosed into the contract and paid the sum of four hundred dollars and seven hundred dollars ~~in consideration of~~ ~~the~~

the goods, but this is not the case. The goods were not
 formal demand was made upon her in December, 1914, for the goods
 chattel mortgage, and when she refused to pay, she was
 and she declined to comply with this demand, but she refused to
 the goods upon the return to her of the goods of the
 which she had paid. Therefore on February 18, 1914, she
 brought this action for specific performance of the contract
 Appellee gave a judgment in the affirmative, and she obtained the goods.
 Appellant filed a motion for a new trial, and she obtained the goods.
 lawful taking and a judgment in the affirmative, and she obtained the goods.
 of the goods. The plaintiff was not able to establish her
 to number, etc. in the goods of the plaintiff. The goods
 seven principal and two additional items. The goods
 non cept and non detinent. The goods were not
 place and it was established that the goods were not
 thereof, and a judgment was entered in the affirmative.
 ruling the return to her of the goods, but she refused to
 waived by replying that she was not able to establish her
 additional items, and she was not able to establish her
 stated a new return, and in doing so she stated that she
 the return. She stated that she was not able to establish her
 goods of the plaintiff, and she was not able to establish her
 judgment was entered in the affirmative, and she obtained the goods.
 for the purpose of the goods, and she was not able to establish her
 by Appellee, and she was not able to establish her
 some return to her of the goods, and she was not able to establish her
 and that a judgment was entered in the affirmative, and she obtained the goods.
 to be of that kind, and she was not able to establish her
 and that a judgment was entered in the affirmative, and she obtained the goods.
 Appellee was not able to establish her

to this property — that is, the property of the
defenses to an action of replevin; and the plaintiff's
damages from appellant become a matter of contract. In
contract, no issue of that kind is raised by the plaintiff's
tender. But, although the plaintiff's tender is not
the goods unless the plaintiff is in default or fails to
tenders back that which it has received from the defendant,
appellant did not do that which it contracted to do, when it was
was not in default, and because the plaintiff's tender
could not re-possess itself of the goods without first
without first returning the goods to the plaintiff.
v. Singer Mfg. Co. 54 Ill. 370; replevin; the
held by defendant under an oral contract of sale
on which twenty dollars was advanced, and the plaintiff
not as contracted for, and the plaintiff's tender
not be recovered. In replevin, the plaintiff's tender
the twenty dollars advanced. v. Singer Mfg. Co., 54 Ill. 370;
American Soda Fountain Co., v. [?], 136 Ill. 11; [?]
v. Great Western Mfg. Co., 5 Ill. 11; [?] v. [?], 136
Ill. 451; Heine Piano Co. v. [?], 136 Ill. 11; [?] v.
Boulais, 48 Ill. 510 are all cases in which the
American Soda Fountain Co., v. [?], 136 Ill. 11;
to a soda fountain. In replevin, the plaintiff's
vendee refused to pay certain money, and the plaintiff
because the vendee's tender was not as contracted for,
the sale being oral only, the plaintiff's tender
held that the vendee's tender was not as contracted for.

[illegible]

with the contract. She paid it either eight hundred or eight hundred and fifty dollars and she went to the store before she ever saw them except that on a visit to the soda fountain. After the making of the contract she saw the goods only at the soda fountain. The goods were made after she had paid for them, so that she could not see them when she was at the fountain. Upon her first discovery of defects, when the goods were underneath, she offered to return them immediately if he would return her money. Under the law she was entitled to do so, but he refused it. Her money was in the pocket of the goods and she was obliged to abandon her business and to leave the goods in the store until her money was refunded.

We find no reversible error in the jury's verdict and judgment is therefore affirmed.

Nichols, J. took no part.

STATE OF ILLINOIS, {
SECOND DISTRICT. { ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.



2528
AT A TERM OF THE APPELLATE COURT,

203 I.A. 514

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 12 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF THE HISTORY OF ARTS

CHICAGO, ILL.

1900

THE UNIVERSITY OF CHICAGO

CHICAGO, ILL.

1900

THE UNIVERSITY OF CHICAGO

CHICAGO, ILL.

1900

THE UNIVERSITY OF CHICAGO

CHICAGO, ILL.

1900

1900

1900

THE UNIVERSITY OF CHICAGO

CHICAGO, ILL.

1900

CHICAGO, ILL.

Gen. No. 6183.

203 I.A. 514

Albert Richard, appellee

vs

Appeal from LaSalle.

Brunner Foundry & Machinery
Co. appellant.

Nischaus, J.

This is an appeal from a judgment in a suit brought by the appellee, Albert Richard, in the Circuit Court of LaSalle County, against the appellant, the Brunner Foundry and Machinery Company, to recover damages, which appellee claims to have sustained on account of permanent injuries to his right eye, resulting from alleged negligence of the appellant. The jury on the trial of the case, returned a verdict finding appellant guilty, and assessing appellee's damages at \$5,000 and the court rendered judgment on the verdict; and this appeal is taken to reverse the judgment.

The negligence charged against the appellant is contained in three counts of the declaration; the first count charges, that the appellant failed and neglected to use reasonable care and caution in the prosecution of ~~xxx~~ its work; which was the putting in of new flues in a boiler; and, that by means of such negligence, the appellee was injured; the second and third counts charge that in the prosecution of its work, the appellant carelessly used an imperfect, defective and ragged drift pin; and that in consequence of ~~u in~~ this imperfect and defective pin, the injuries to appellee were caused.

The injuries to appellee occurred in the boiler room of the St. Paul Coal Co. at Cherry, Illinois, where the appellee was employed as a fireman. This boiler room was a large room, in which there were six boilers. The appellant was engaged in ~~put-~~

2031A. 514

Gen. No. 6183.

Albert Richard, appellee

Appellant from District

vs

Brunner County & Machinery

Co. appellant.

Nicholas, V.

This is an appeal from a judgment in a suit brought by the appellee, Albert Richard, in the Circuit Court of LaSalle County, against the appellant, the Brunner County and Machinery Company, to recover damages, which appellee claims to have sustained on account of permanent injuries to his right eye, resulting from alleged negligence of the appellant. The jury on the trial of the case, returned a verdict finding appellant guilty, and assessing appellee's damages at \$5,000 and the court rendered judgment on the verdict; and this appeal is taken to reverse the judgment.

The negligence charged against the appellant is contained in three counts of the declaration; the first count charges that the appellant failed and neglected to use reasonable care and caution in the prosecution of his work; which was the putting in of new flues in a boiler; the second and third counts charge that in the prosecution of its work, the appellant carelessly used an imperfect, defective and ragged drift pin; and set in consequence of a defective imperfect and defective pin, the appellant to certain work.

The injuries to appellee occurred in the boiler room of St. Paul Coal Co. at Cherry, Illinois, where appellee was employed as a fireman. This boiler room was one of the four in which there were six boilers. The same was set in charge of

ting in new flues for the St. Paul Coal Co. in Boiler No. 6 and the appellee was at work at boilers Number 4 and 5, adjacent. At the time of the injury, appellant's employees were engaged in the act of expanding a new flue, which they were putting in boiler No. 6. This new flue was being expanded at the face of the boiler, and the expanding was done by placing an expander, (which is a round tube about a foot in length) into the end of the flue; then pounding into the expander a steel drift pin, about 6 or 7 inches in length. The drift pin is a tool which tapers toward the end, which is inserted into the expander; and is larger at the other end, which is the head, and which is pounded by a sledge hammer, with such force as to gradually drive the pin into the expander and thereby expand the flues and tighten them in the boiler. A drift pin when properly made for the work, should be of hardened steel, at the smaller end; the head should properly be of steel sufficiently soft to prevent the chipping and flying off of steel particles, by the concussion of the pounding.

The evidence tends to show, that while the appellee was engaged in performing his duties as fireman at the boilers Numbers 4 and 5, about 15 feet away from the place where appellants' employees were at work expanding the flue in boiler No. 6, that a small particle of steel flew off from the pounding of the drift pin, and struck appellee's right eye, causing injuries from which blindness of this eye resulted.

The testimony of the experts who were called by the appellant, is to the effect, that the drift pin involved in this case, was properly made for its use and purpose; the steel being hardened at the small end, and sufficiently soft at the head end; so that in the ordinary and proper use, which would be made of the pin in the expanding of the flues, there

ting in new lines for the St. Paul Coal Co. in Boiler No. 6 and the appellee was at work at boilers Number 4 and 5, adjacent. At the time the injury, appellant's employees were engaged in the act of expanding a new line, which they were putting in boiler No. 6. This new line was being expanded at the face of the boiler, and the expanding was done by placing an expander, (which is a round tube about a foot in length) into the end of the line; then pounding into the expander a steel drift pin, about 6 or 7 inches in length. The drift pin is a tool which tapers toward the end, which is inserted into the expander; and is larger at the other end, which is the head, and which is pounded by a sledge hammer, with such force as to gradually drive the pin into the expander and thereby expand the lines and tighten them in the boiler. A drift pin when properly made for the work, should be of hardened steel, at the smaller end; the head should properly be of steel sufficiently soft to prevent the chipping and flying off of steel particles, by the concussion of the pounding. The evidence tends to show, that while the appellee was engaged in performing his duties as fireman at the boilers Number 4 and 5, about 15 feet away from the place where appellant's employees were at work expanding the line in boiler No. 6, that a small particle of steel flew off from the pounding of the drift pin, and struck appellee's right eye, causing injuries from which blindness of this eye resulted. The testimony of the coxeter who were called by the appellant, is to the effect, that the drift pin involved in this case, was properly made for its use and purpose; the steel being hardened at the small end, and sufficiently soft at the head end; so that in the ordinary use, no sparks, which would be made of the pin in the expanding of the lines, would

would be no danger of steel particles flying off, when the pin was pounded by the sledge hammer. The testimony of the experts however, also tends to prove, that particles of steel might fly off by an improper or negligent pounding of the pin by the sledge hammer. Otto J. Sentfelter testified, referring to steel flying off of the drift pin by pounding, "it would not fly off unless it was a glancing blow on the edge of it, that would break a piece off; and that would not cause it to fly unless it would strike something, and glance off." Albert Haese, another expert, testified in answer to the question as to what effect the striking of by a sledge hammer would have on the pin in question, that it would all depend, on how the pin was struck, and, that in one way of striking it with a hammer, a piece might fly a couple of feet; but Andrew H. Neureuther another expert, testified, that "it would be hard to take that pin and say whether any pieces of steel have broken off; and how they broke off, and whether they went one foot or how far."

This evidence together with the fact, which is also in proof that particles of steel repeatedly flew through the air from the pounding, makes it appear very probable, that there must have been an improper or careless striking of the pin with the sledge-hammer, in consequence of which, a particle of steel was sent flying through the air, and struck appellee's eye. And ~~this~~ this view is strengthened also, by the evidence, that the manipulator of the sledge hammer, was wholly inexperienced in that line of work, and admits, that he made at least one foul stroke at the pin with the sledge hammer.

There is, therefore evidence tending to prove the allegation of negligence made in the first count of the Declaration

Appellant also contends, as a ground for reversal, that the court admitted improper evidence on the part of the appellee as to the possible results of the injury; whether the injury

would be no danger of steel particles flying off, when the pin was pounded by the sledge hammer. The testimony of the experts, however, also tends to prove, that particles of steel might fly off by an improper or negligent pounding of the pin by the sledge hammer. Otto J. Gentilester testified, referring to steel flying off of the drift pin by pounding, "it would not fly off unless it was a glancing blow on the edge of it, that would break a piece off; and that would not cause it to fly unless it would strike something, and glance off." Albert Hease, another expert, testified in answer to the question as to what effect the striking of a sledge hammer would have on the pin in question, that it would all depend, on how the pin was struck, and, that in one way of striking it with a hammer, a piece might fly a couple of feet; but Andrew H. Neustatker, another expert, testified, that "it would be hard to take that pin and say whether any pieces of steel have broken off; and how they broke off, and whether they went one foot or how far." This evidence together with the fact, which is also in proof that particles of steel repeatedly flew through the air from the pounding, makes it appear very probable, that there must have been an improper or careless striking of the pin with the sledge hammer, in consequence of which, a particle of steel was sent flying through the air, and struck appellee's eye. And that this view is strengthened also, by the evidence, that the manipulator of the sledge hammer, was highly inexperienced in that line of work, and admitted, that he made at least one "foul" stroke at the pin with the sledge hammer.

There is, therefore evidence tending to prove the negligence of negligence made in the first count of the petition. Appellant also contends, as a ground of recovery, that the court admitted improper evidence on the part of the appellee as to the possible results of the injury; and that the injury

might possible result in necessary removal of the eye; and what effect it might possibly have on the remaining eye, with reference to developing sympathetic iphtalmia. While the answers of Dr. Woodruff in this regard, and concerning what might possibly happen, in the future, must be regarded as incompetent, they were so regarded by the trial court, and excluded. There is nothing in the record from which this court could reasonably infer, that the jury took the excluded testimony into consideration, in finding their verdict, or were in any influenced by it. No error is therefore apparent, on that ground. It is true, there are cases, where certain incompetent statements made by a witness, even though excluded, might ~~ex-~~prejudicially affect the rights of a defendant in a personal injury case; but that does not appear to have been the case here.

The amount of damages fixed in the verdict is not excessive, considering the grave character of the actual injury to the appellee, and its disastrous consequences to him.

For the reasons stated, the judgment should be affirmed.

Affirmed.

Carnes, J. dissents.

might possible result in necessary removal of the eye; and what effect it might possibly have on the remaining eye, with reference to developing sympathetic ophthalmia. While the answers of Dr. Woodruff in this regard, and concerning what might possibly happen, in the future, must be regarded as incompetent, they were so regarded by the trial court, and excluded. There is nothing in the record from which this court could reasonably infer, that the jury took the excluded testimony into consideration, in finding their verdict, or were in any influenced by it. No error is therefore apparent, on that ground. If it be true, there are cases, where certain incompetent statements made by a witness, even though excluded, might prejudicially affect the rights of a defendant in a personal injury case; but that does not appear to have been the case here.

The amount of damages fixed in the verdict is not excessive, considering the grave character of the actual injury to the appellee, and its disastrous consequences to him. For the reasons stated, the judgment should be affirmed.

Affirmed.

Garner, J. dissents.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa. this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6344 25 27
AT A TERM OF THE APPELLATE COURT,

2031.A. 515

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois;

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

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the Clerk's office of said Court, in the words and figures
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Gen. No. 6244

2031A. 515

E. Meers, appellee

vs

Appeal from Will.

Edward J. Daley, appellant.

Niehau, P.J.

This is an action in assumpsit, brought by E. Meers, the appellee, against Edward J. Daley, the appellant to recover fees for services rendered by appellee as attorney for appellant. The declaration consists of the common counts, to which a specific bill of particulars was added under a rule of the court. The appellant pleaded the general issue, and payment. The case was tried by a jury, which returned a verdict assessing appellee's damages at \$2,000. The appellant thereupon made a motion for a new trial, which was overruled, and the court entered judgment upon the verdict, for the sum of \$2,000; from which judgment an appeal was taken to this court.

Various questions are raised on the appeal, but the chief contentions of the appellant, are that the verdict is not supported by the evidence, and that some of the instructions given were erroneous.

It appears from the evidence that John Daley, a farmer living near Lockport, in Will County, died testate, about the 24th. day of February 1913. The will which he left disposed of property amounting in value to about \$150,000. He left no widow; but left the following surviving children: Edward J. Daley, who was named as Executor in the will; Thomas Daley Mrs. Margaret McCoy, and Mrs. Susan Bush. By the terms of the will, he left Edward J. Daley 345.76 acres of land, subject to the payment of a legacy of \$4,000 to the appellants sister Mrs. Susan Bush; to his son Thomas Daley, he devised 199.74 acres of land; and to his daughter Margaret McCoy, only the

2031A. 515

Gen. No. 6244

E. Meers, appellee,

Appeal from Will.

vs

Edward J. Daley, appellant.

Nichols, P.J.

This is an action in assumpsit, brought by E. Meers, the appellee, against Edward J. Daley, the appellant to recover fees for services rendered by appellee as attorney for appellant. The declaration consists of the common counts, to which a specific bill of particulars was added under a rule of the court. The appellant pleaded the general issue, and payment. The case was tried by a jury, which returned a verdict assessing appellee's damages at \$2,000. The appellant thereupon made a motion for a new trial, which was overruled, and the court entered judgment upon the verdict, for the sum of \$2,000; from which judgment an appeal was taken to this court. Various questions are raised on the appeal, but the chief contentions of the appellant, are that the verdict is not supported by the evidence, and that some of the instructions given were erroneous.

It appears from the evidence that John Daley, a farmer living near Rockport, in Will County, died testate, about the 24th day of February 1913. The will which he left disposed of property amounting in value to about \$150,000. He left no widow; but left the following surviving children: Edward J. Daley, who was named as Executor in the will; Thomas Daley, Mrs. Margaret McCoy, and Mrs. Susan Bush. By the terms of the will, he left Edward J. Daley 325.75 acres of land, and to the payment of a legacy of \$4,000 to the said Margaret McCoy. Mrs. Susan Bush; to his son Thomas Daley, he devised 12.75 acres of land; and to his daughter Margaret McCoy, only one

sum of \$100. The testator devised some of his property to his grandchildren, namely, to the children of a deceased son, David Daley, a farm of 113 acres; to the six children of the appellant, he bequeathed the sum of \$500. each, and also some real estate in the city of Lockport. The residue of his estate was also devised to the children of the appellant. The will was made on March 4, 1905 and the testator at that time was 80 years of age.

Under the provisions of the will, it is apparent that appellant received the larger part of his father's estate; and that his children received most of the personal estate, amounting perhaps to the sum of \$20,000. After the will had been admitted to probate, the letters testamentary issued to the appellant, and an inventory of the real and personal property filed and approved by the Probate Court, the testator's son, Thomas Daley, and his daughter, Margaret McCoy, filed a bill in equity in the Circuit Court of Will County, to set aside the will, making the appellant, and all the children and grandchildren of the testator, parties defendant to the bill. The bill charged, that the appellant and his wife used undue arts and fraudulent practices, and resorted to falsehood and misrepresentation, to induce the testator to execute the will in question; and that he was kept under improper restraint by them; and that they exercised an undue influence over him; also, that his mind and memory were so impaired by an excessive use of intoxicating liquors, that he was on that account, incapable of making a proper distribution of his estate.

Appellee was retained as solicitor to act for the appellant, in the matter of the contest of the will mentioned. The evidence shows, that he took leading charge of the litigation, being assisted, however, by William W. North, in

sum of \$100. The testator devised some of his property to his grandchildren, namely, to the children of a deceased son, David Daley, a farm of 113 acres; to the six children of the appellant, he bequeathed the sum of \$500 each, and also some real estate in the city of New York. The residue of his estate was also devised to the children of the appellant. The will was made on March 4, 1908 and the testator at that time was 80 years of age.

Under the provisions of the will, it is apparent that appellant received the larger part of his father's estate; and that his children received most of the personal estate, amounting perhaps to the sum of \$30,000. After the will had been admitted to probate, the letters testamentary issued to the appellant, and an inventory of the real and personal property filed and approved by the Probate Court, the testator's son, Thomas Daley, and his daughter, Margaret McCoy, filed a bill in equity in the Circuit Court of Will County, to set aside the will, taking the appellant, and all the children and grandchildren of the testator, parties defendant to the bill. The bill charged, that the appellant and his wife used undue arts and fraudulent practices, and resorted to falsehoods and misrepresentation, to induce the testator to execute the will in question; and that he was kept under improper restraint by them; and that they exercised an undue influence over him; also, that his mind and memory were so impaired by an excessive use of intoxicating liquors, that he was on that account, incapable of making a proper distribution of his estate.

A police was retained as solicitor to act for the appellant, in the matter of the contest of the will mentioned. The evidence shows, that he took leading charge of the litigation, being assisted, however, by William W. Smith, in

looking after the defense to be made against the charges in the bill of complaint; that he took the necessary steps, by proper investigation of the legal questions involved, and an inquiry into the facts; and ascertained and examined the various witnesses, who were supposed to have knowledge of the matters put in issue by the averments of the bill; and that he rendered valuable and successful service to his client, which finally culminated in procuring a settlement of the litigation that was quite favorable to the interests of the appellant. Appellee had received in all the sum of \$500.00 for his services prior to the commencement of this suit.

To establish the value of his services, the appellee called a number of leading practitioners of the Will County bar, who testified, that the usual and customary fee charged and paid for such services as were rendered by appellee, was from \$3000 to \$3500. The hypothetical question under which the testimony was elicited, is objected to by the appellant, on the ground that it is broader than the evidence warrants, and embraces matters that are conclusions, rather than facts. We do not regard the objection as well taken: there is evidence tending to prove all the various elements embraced in the hypothetical question; at least, all that are of vital importance as a basis for an answer.

Appellant insists that the jury was not bound by the estimates of value, which the expert witnesses placed upon the services of appellee; and perhaps is correct in his position, that these estimates should be considered merely as matters of opinion of men of experience in such matters, whose judgment is given to the jury for the purpose of aiding them in forming their own judgment concerning the amount which should properly be allowed; and that after all a jury have a right to

Looking after the defense to be made against the charges in the bill of complaint; that he took the necessary steps, by proper investigation of the legal questions involved, and an inquiry into the facts; and ascertained and examined the various witnesses, who were supposed to have knowledge of the matters put in issue by the averments of the bill; and that he rendered valuable and successful service to his client, which finally culminated in procuring a settlement of the litigation that was quite favorable to the interests of the appellant. Appellee had received in all the sum of \$800.00 for his services prior to the commencement of this suit.

To establish the value of his services, the appellee called a number of leading practitioners of the Will County bar, who testified, that the usual and customary fee charged and paid for such services as were rendered by appellee, was from \$2000 to \$3500. The hypothetical question under which the testimony was elicited, is objected to by the appellant, on the ground that it is broader than the evidence warrants, and embraces matters that are conclusions, rather than facts. We do not regard the objection as well taken: there is evidence tending to prove all the various elements embraced in the hypothetical question; at least, all that are of vital importance as a basis for an answer.

Appellant insists that the jury was not bound by the estimates of value, which the expert witnesses placed upon the services of appellee; and perhaps is correct in his position, but these estimates should be considered merely as evidence of opinion of men of experience in such matters, whose judgment is given to the jury for the purpose of aiding them in reaching their own judgment concerning the amount which should properly be allowed; and that either a jury have a right to

use their own knowledge and judgment, based upon all the evidence, as to what would be a reasonable compensation for the services. *Head v Hargrave*, 105 U. S. 45. *Forsyth v Doolittle* 130 U.S. 73. Appellant contends that error was committed because "there was no instruction in the case permitting the jurors to exercise their own judgment or discretion as to the value of such services." It is sufficient to say, with reference to this point, that inasmuch as the court was not required of its own motion, to give such an instruction, and as no instruction was requested by the appellant, concerning this matter, this question is not really before us for decision.

Appellant also insists, that it was error for the court to instruct the jury that "the plaintiff is only required to prove his case by a preponderance of the evidence, and that by a preponderance of the evidence is meant the greater weight of credible evidence, and that while as a matter of law, the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, this would be sufficient for the jury to find the issues in his favor." Appellant contends, that this instruction, while proper in ordinary cases, was misleading in this case, because of the introduction of expert testimony as to the value of the services that the jury might have inferred from the instruction, that they were bound to fix the value of the services rendered, at what the expert witnesses had fixed it, because that amount had been established by a preponderance of the evidence, when as a matter of law, they were not bound by the opinions of attorneys concerning a reasonable charge for the services, and had a right to use their own judgment and knowledge concerning the value of such services; and that the instruc-

use their own knowledge and judgment, based upon all the evidence, as to what would be a reasonable compensation for the services. *Heck v. Hargrave*, 105 U.S. 425. *Forayth v. Doolittle*, 130 U.S. 73. Appellant contends that error was committed because "there was no instruction in the case committing the jurors to exercise their own judgment or discretion as to the value of such services." It is sufficient to say, with reference to this point, that inasmuch as the court was not required of its own motion, to give such an instruction, and as no instruction was requested by the appellant, concerning this matter, this question is not really before us for decision. Appellant also insists, that it was error for the court to instruct the jury that "the plaintiff is only required to prove his case by a preponderance of the evidence, and that by a preponderance of the evidence is meant the greater weight of credible evidence, and that while as a matter of law, the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still in the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, this would be sufficient for the jury to find the issues in his favor." Appellant contends, that this instruction, while proper in ordinary cases, was misleading in this case, because of the introduction of expert testimony as to the value of the services that the jury might have inferred from the instruction, that they were bound to fix the value of the services rendered, at what the expert witnesses had fixed it, because that amount had been established by a preponderance of the evidence, when as a matter of law, they were not bound to do so. The introduction of attorneys concerning a reasonable value for the services, and had a right to use their own judgment and knowledge concerning the value of such services; and that the instruction

tions might have led the jury to believe that they had no such right.

We are unable to take this view of the matter, and the record does not justify the inference which appellant draws. In fact the record shows, that the jury's own knowledge and judgment must have entered effectively into their consideration of the matter of the amount to be allowed appellee for his services, as the verdict fixes the amount at \$500.00 less than the minimum amount fixed by appellee's witnesses; and this is especially significant, because appellant called no witnesses to contradict appellee's witnesses on this point. There was no impropriety in giving the jury an instruction concerning the preponderance of the evidence; and the instruction in question has been repeatedly approved.

While the amount of appellee's fee fixed by the jury is large, it is apparent that the benefits which accrued to appellant from appellee's services, is also large; there is nothing in the record to ~~xxxxxxx~~ indicate that the amount is excessive.

The judgment is affirmed.

Judgment affirmed.

tion might have led the jury to believe that they had no such right.

We are unable to take this view of the matter, and the record does not justify the inference which appellant draws. In fact the record shows, that the jury's own knowledge and judgment must have entered effectively into their consideration of the matter of the amount to be allowed appellant for his services, as the verdict fixes the amount at \$500.00, less than the minimum amount fixed by appellee's witnesses; and this is especially significant, because appellant called no witnesses to contradict appellee's witnesses on this point. There was no impropriety in giving the jury an instruction concerning the proportion of the evidence; and the instruction in question has been repeatedly approved.

While the amount of appellee's fee fixed by the jury is large, it is apparent that the benefits which accrued to appellant from appellee's services, if any, were large; there is nothing in the record to indicate that the amount is excessive.

The judgment is affirmed.

W. H. H. H. H.

STATE OF ILLINOIS, }
SECOND DISTRICT. }

ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.



2531

AT A TERM OF THE APPELLATE COURT,

2031 A. 523

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

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the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
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Gen. No. 6259

Fred Meixner, appellant.

203 I.A. 28

vs

Appeal from Co. Ct. Peoria.

Western Live Stock Ins. Co.

appellee.

Carnes, J.

Fred Meixner, the appellant, sued the appellee insurance company in assumpsit for \$150.00 that it had received from him in part payment of his subscription of \$500.00 to its capital stock, claiming that the subscription was fraudulently obtained and that the company had agreed to cancel it and return the money. There is no controversy about the facts. At the close of the evidence each party moved for a directed verdict. The court granted the company's motion. A verdict was rendered in its favor, and ~~judgment~~ judgment entered thereon, from which this appeal is prosecuted.

It appeared that the company had employed one Davis to procure stock subscriptions and he had engaged one Hardy as sub-agent; that Hardy went to Chillicothe, Illinois, made the acquaintance of appellant, and solicited a subscription from him. After several visits and appellant's refusal to buy the stock Hardy told him that he had a little of the stock still to sell; that he had some himself and wanted some more; that he had all he could get from the company and must have somebody else take the stock; that if appellant would subscribe for twenty five shares of the stock and advance \$150.00 he, Hardy, would sell it within sixty days and pay back the \$150.00 with a profit in addition to six per cent interest. Appellant says his idea was that Hardy would sell this stock if it advanced and he would get the \$150.00 back and a little profit. June 13, 1913, appellant signed a subscription for the stock, gave Hardy \$150.00 which was remitted to

for the stock, gave Hardy \$150.00 which was refunded to
profit. June 13, 1913, appellant signed a subscription

it it advanced and he would get the \$150.00 back and a little
Appellant says his idea was that Hardy would sell this stock

\$150.00 with a profit in addition to six per cent interest.

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subscribe for twenty five shares of the stock and advance \$150.

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more; that he had all he could get from the company and must

stock still to sell; that he had some himself and wanted some

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made the acquaintance of appellant, and solicited a subscrip-

as sub-agent; that Hardy went to Chillicothe, Illinois,

procure stock subscriptions and he had engaged one Hardy

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this appeal is presented.

its favor, and ~~judgment~~ judgment entered thereon, from which

court granted the company's motion. A verdict was rendered in

of the evidence each party moved for a directed verdict. The

money. There is no controversy about the facts. At the close

and that the company had agreed to cancel it and return the

stock, claiming that the subscription was fraudulently obtained

in part payment of his subscription of \$500.00 to the capital

company in installment for \$150.00 that it had received from him

Tred Melner, the appellant, and the appellee insurance

Garner, J.

appellee.

Western Live Stock Ins. Co.

vs

Appeal from Co. Ct. Peoria.

Tred Melner, appellant.

Gen. No. 6353

203 I. A. 32

appellee with the stock subscription. Appellee returned the \$100.00 to Davis as his commission on the \$500.00 stock subscription, and retained the balance of \$50.00.

Appellant heard no more from Hardy but December 6, 1913, received notice from appellee to pay the balance of his subscription. Meantime he had become suspicious of Hardy and consulted E. A. Mitchell about the transaction.

December 10, 1913 Mitchell wrote appellee saying that Meixner claimed Hardy induced him to subscribe for the stock on the ground that he would go in partnership with him and sell the stock inside of sixty days, and pay him back the \$150.00 with one half the profits on the stock, Hardy to have the other one-half for his work in selling the stock at an advance; that as the stock was sold through misrepresentations Meixner would not pay the \$350.00 and desired a return of the \$150.00 and cancellation of the stock as far as he was concerned.

The president of appellee answered saying it was impossible to cancel and return the subscription since a commission had already been paid the stock salesman on the full amount of the sale reported; that he had before received complaints of the actions of Davis' sub-agents in selling stock and was convinced that unscrupulous schemes were employed; that he would get after Davis and see if an amicable settlement could be arranged. The following April Mitchell wrote the president of appellee that Meixner wanted Hardy or the company to pay him the amount he paid, or he would take the matter into court. The president answered saying that they were anxious to get hold of Hardy and see that he make restitution to Meixner; that he was in correspondence with Davis about the matter and had told him as far as the company was concerned only a complete restitution or reimbursement of funds to the injured parties would be satis-

appeles with the stock subscription. Appelles returned the \$100.00 to Davis as his commission on the \$500.00 stock subscription, and retained the balance of \$50.00.

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The president of appellee answered saying it was impossible to cancel and return the subscription since a commission had already been paid the stock salesman on the full amount of the sale reported; that he had before received complaints of the actions of Davis' sub-agents in selling stock and was convinced that fraudulent schemes were employed; that he would get after Davis and see if an amiable settlement could be arranged.

The following April Mitchell wrote the president of appellee that Meixner wanted Hardy or the company to pay him the amount he paid, or he would take the matter into court. The president answered saying that they were anxious to get hold of Hardy and see that he make restitution to Meixner; that he was in correspondence with Davis about the matter and had told him as far as the company was concerned only a complete restitution or reimbursement of funds to the injured parties could be satis-

factory. May 8, 1914, appellant received a call for unpaid subscriptions and Mitchell answered that Meixner and other

parties- naming them - claimed their subscriptions were obtained by fraudulent representations by an agent employed by appellee and they looked to the company to cancel the subscriptions and refund the amounts paid. The president replied that the notices sent were a matter of form and to clear their records, and said "The justice of the claims of your clients, however, is undeniable and will be adjusted to your satisfaction I assure," and quoted from a letter that he had written Davis asking him to return all the commissions paid in those matters and saying the company would return such portions of the subscriptions paid as was not paid in commissions, thus returning the full amount to each subscriber and cancel the subscription. January 2, 1915, Mitchell wrote the president that unless Meixner's claim against the company is paid in full by the fifteenth of the month he will begin suit for the amount. The president answered saying he had promised sometime ago to adjust the matters and had been delayed, but "should Mr. Meixner not be inclined to wait and if his case bears the merit I believe it to, I would suggest that he start a friendly suit against us in the county court here, and upon the production of his receipts and such other evidence as I am led to believe he possesses (and should I be correct in this surmise) we, of course, will make no defence in the matter but allow him to take judgment against us without attempt to refute such claim." February 17th. appellee's secretary wrote asking for copies of the receipts held by appellant, and other parties. March 2nd. Mitchell wrote the president acknowledging receipt of the secretary's letter of February 17th. saying "We have a request that we furnish copies of these receipts to the Chicago parties with a view to the settlement of this entire matter, and will appreciate it if you will assist

of this entire matter, and will appreciate it if you will send
receipts to the Chicago parties with a view to the settlement
saying "We have a request that we furnish copies of the
leading receipt of the secretary's letter of February 15th
other parties. March 2nd. Mitchell wrote the president acknow-
wrote asking for copies of the receipts held by a fellow, and
to refute such claim." February 15th. Applebee's secretary
ter but allow him to take judgment against me without attempt
this summae) we, of course, will make no defence in the matter
am led to believe he possesses (and should I be correct in
the production of his receipts and such other evidence as I
friendly suit against us in the county court here, and upon
the merit I believe it to, I would suggest that he start a
Meixner not be inclined to wait and if his case bears
to adjust the matters and had been delayed, but "should Mr.
The president answered saying he had promised sometime ago
teenth of the month he will begin suit for the amount.
Meixner's claim against the company is paid in full by the fif-
January 2, 1915. Mitchell wrote the president that unless
the full amount to each subscriber and cancel the subscription.
subscriptions paid as was not paid in commissions, thus returning
and saying the company would return such portions of the sub-
asking him to return all the commissions paid in those matters
"I am sure," and quoted from a letter that he had written Davis
however, is undeniable and will be adjusted to your satisfaction
records, and said "The justice of the claims of your clients,
that the notices sent were a matter of form and to clear their
tions and refund the amounts paid. The president replied
Applebee and they looked to the company to cancel the subscrip-
obtained by fraudulent representations by an agent employed by
parties-naming them - claimed their subscriptions were
subscriptions and Mitchell answered that Meixner and other
factory. May 8, 1914. Applebee received a call for unpaid

us in this matter."

The above is the substance of all the correspondence shown by the record. The summons issued in this case November 10th. 1915, about eight months after the date of the last latter. Appellee's counsel, to avoid the implication that x appellant was induced to bring this suit on the suggestion that it would not be defended, say that on investigation the company concluded it was not liable and refused to pay, and so notified appellant. This does not appear in the record and does not affect the questions of law presented.

No point is made on the pleadings. The question argued here is whether under the above admitted facts the company was legally obliged to pay appellant the sum of money demanded. In our opinion it was not liable because of anything that occurred in the original subscription transaction. Appellant knew he was not dealing with the company in the matter of the proposed re-sale of this stock. He knew that he was dealing with Hardy and supposed Hardy was doing something ~~xxxxxx~~ indirectly that the company would not allow him to do directly in obtaining an interest in the stock subscribed for. Even though Hardy did not intend to keep his promise to re-sell the stock it was not such a false representation as would furnish ground for an action of fraud and deceit. It is familiar law that the fraudulent and deceitful representation relied on must be concerning an existing fact or facts to furnish a ground of action. Grubb v Milan 249 Ill. 456. There is no evidence in the record as to the value of the stock, or of Hardy's actual intention in the matter further than can be inferred from his inaction. Appellee did not cancel the stock subscription, and for anything that here appears it may be ~~that~~ a valuable investment for appellant.

Appellant argues that the correspondence above set forth should be taken as a promise by appellee to refund to

us in this matter."

The above is the substance of all the correspondence shown by the record. The summons issued in this case November 10th, 1912, about eight months after the date of the last letter. Appellee's counsel, to avoid the implication that appellee was induced to bring this suit on the suggestion that it would not be defended, say that on investigation the company concluded it was not liable and refused to pay, and so notified appellee. This does not appear in the record and does not affect the questions of law presented.

No point is made on the pleadings. The question argued here is whether under the above admitted facts the company was legally obliged to pay appellee the sum of money demanded. In our opinion it was not liable because of anything that occurred in the original subscription transaction. Appellant knew he was not dealing with the company in the matter of the proposed re-sale of his stock. He knew that he was dealing with Hardy and supposed Hardy was doing something ~~xxxxxx~~ indirectly that the company would not allow him to do directly in obtaining an interest in the stock subscribed for. Even though Hardy did not intend to keep his promise to re-sell the stock it was not such a false representation as would furnish ground for an action of fraud and deceit. It is familiar law that the fraudulent and deceitful representation relied on must be concerning an existing fact or facts to furnish a ground of action. *Grubb v Milan* 242 Ill. 458. There is no evidence in the record as to the value of the stock, or of Hardy's actual intention in the matter further than can be inferred from his conduct. Appellee did not cancel the stock subscription, and for aught that here appears it may be that a valuable investment was made. Appellant argues that the correspondence above set forth should be taken as a promise by appellee to return the

appellant the amount of his subscription. we do not think it material to the decision of this case whether it should or not be so construed. Assuming that it was a promise by the company itself to return to appellant the amount paid by him on this subscription, there is no consideration to support that promise. There is no evidence tending to show any benefit to the promisor or damage to the promisee that would furnish a consideration for the promise. Appellee had a motive prompting it to make the promise, but the fact that there is a motive for the promise does not supply the element of consideration (9 Cyc. 330. There was no moral obligation sufficient to support the promise. It is said in 9 Cyc. 356- "It is settled as a general proposition in most jurisdictions that a promise made under a sense of moral obligation is not made upon a sufficient consideration, and is not legally binding." It appears in the notes that there is some conflict of authority, and Illinois cases are cited as not in accord with the statement in the text. The last holding of our supreme court on the subject that we find is in *Schwerdt v Schwerdt* 235 Ill. 386, 390, where the court said; -"The only moral obligation which affords consideration for a promise is one which has at sometime been a legal duty." Applying this test, there being no legal duty on appellee before the making of the promise to pay the amount demanded, there was no moral obligation sufficient to furnish a consideration for the promise.

The court did not err in directing a verdict for appellee. Therefore the judgment is affirmed.

Affirmed.

appellant the amount of his subscription. We do not think it material to the decision of this case whether it should or not be so construed. Assuming that it was a promise by the company itself to return to appellant the amount paid by him on this subscription, there is no consideration to support that promise. There is no evidence tending to show any benefit to the promisee or damage to the promisee that would furnish a consideration for the promise. Appellee had a motive prompting it to make the promise, but the fact that there is a motive for the promise does not supply the element of consideration (9 Cyc. 389). There was no moral obligation sufficient to support the promise. It is said in 9 Cyc. 388- "It is settled as a general proposition in most jurisdictions that a promise made under a sense of moral obligation is not made upon a sufficient consideration, and is not legally binding." It appears in the notes that there is some conflict of authority, and Illinois cases are cited as not in accord with the statement in the text. The last holding of our supreme court on the subject that we find in *Schwartz v Schwartz* 335 Ill. 386, 380, where the court said: "The only moral obligation which affords consideration for a promise is one which has at sometime been a legal duty." Applying this test, there being no legal duty on appellee before the making of the promise to pay the amount demanded, there was no moral obligation sufficient to furnish a consideration for the promise.

The court did not err in directing a verdict for appellee. Therefore the judgment is affirmed.

ALLIANCE.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

6251
2352
AT A TERM OF THE APPELLATE COURT,

203 I.A. 525

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

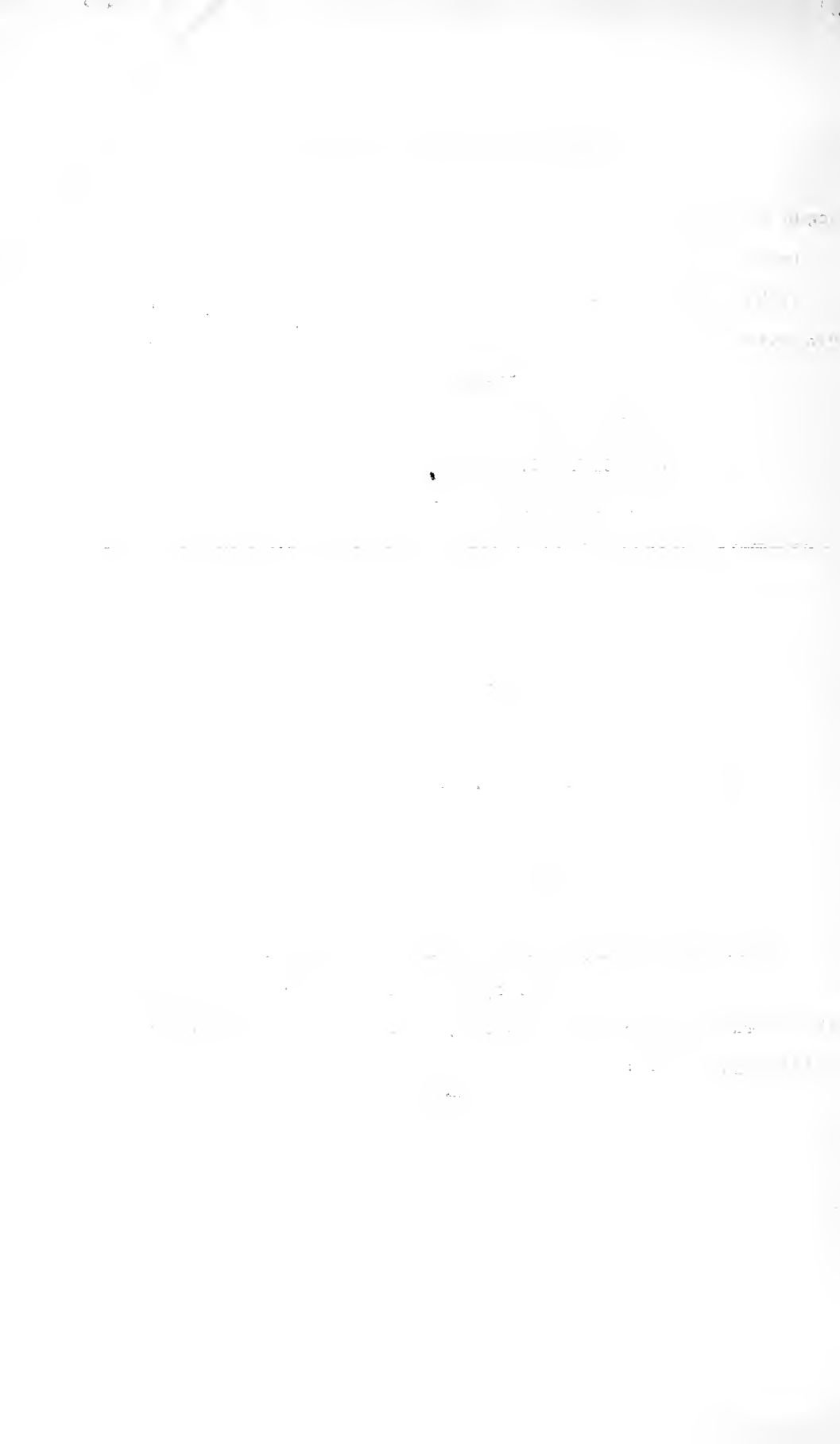
CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 12 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:



Gen. No. 6271.

2031 A 527

Vera Thompson,
Appellant,

-vs-

Appeal from Will.

The J. D. Thompson Carnation
Company, Helen T. Fish,
Charles M. Fish, Fannie T.
Quintero, P. W. Peterson,
B. Wunderlick, and Frank M.
Fairfield,
Appellees.

CARNES, J.

The J. D. Thompson Carnation Company is an Illinois corporation with a capital stock of \$58,000. and shares of the par value of \$100. each, engaged in the growth and sale of cut flowers and plants. Its capital stock is nearly all owned by the appellant, Vera Thompson, her sister, Helen T. Fish, and her husband, Charles M. Fish, the other individual parties to this suit being small stockholders. A controversy arose as to the control of the corporate affairs, which depended on the ownership of six and one-half shares of the stock that was claimed by Helen T. Fish and treated as hers by the corporate authorities. Vera Thompson filed her bill in this case claiming to be the owner of one and one-half of said shares under an agreement that she set forth in her bill and proved, and obtained a decree in her favor as to said one and one-half shares, and no cross error is assigned as to that portion of the decree. She, in her bill, claimed the other five shares on the ground that she had purchased them from John D. Thompson, her brother, in the lifetime of her father, John M. Thompson. Her sister, Helen T. Fish, claimed these five shares under a contract to purchase

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- 37 -

The J. D. Thompson Generation
 Company, Helen T. Nash,
 Charles M. Nash, T. M. T.
 Quintero, P. W. Peterson,
 B. Wunderlick, and Frank M.
 Weirfield,
 Appleton.

1. CARPENT

The T. D. Thompson Carnation Company is an Illinois corporation with a capital stock of \$50,000, and shares of the par value of \$100 each, engaged in the growth and sale of cut flowers and plants. Its capital stock is nearly all owned by the appellant, Vera Thompson, her sister, Helen T. Fish, and her husband, Charles M. Fish, the other individual parties to this suit being small stockholders. A controversy arose as to the control of the corporate affairs, which descended on the ownership of six and one-half shares of the stock that was claimed by Helen T. Fish and treated as hers by the corporate authorities. Vera Thompson filed her bill in this case claiming to be the owner of one and one-half of said shares under an agreement that she got forth in her bill and answer, and claiming that in her favor as to said one and one-half shares, and no error is assigned as to that portion of the record. Her bill, claiming the other five shares on the ground that she had purchased them from John S. Thompson, brother, the lifetime of her father, John T. Thompson, and that T. Fish, claimed the five shares under a will of her father.

10, 1908, hereinafter set forth, between herself and her father. The chancellor found, as a matter of fact, that the father, John M. Thompson, owned the five shares at the time of making the contract with Helen T. Fish, and that the ownership of the stock depended upon the construction of the contract. Appellant acquiesces in the finding that the father, John M. Thompson, owned the five shares of stock at the date of the contract and rests her case here entirely on the question of the validity and effect of that contract, claiming that it is void as against public policy, and also as an attempted testamentary disposition of property. The chancellor found the contract valid and enforceable; that it "was not a testamentary disposition of property"; that "the legal and equitable right and title in and to said five shares of stock were intended to be vested and ought to be vested in the said Helen T. Fish at the death of John M. Thompson," and by his decree confirmed the title of Helen T. Fish to said five shares subject to the provisions in favor of Vera Thompson as to dividends and payment of money to her by Helen T. Fish found in the third and seventh clauses of said contract. If the contract is void for either of the two reasons suggested by appellant the decree is erroneous. If it is not open to either of those two objections there is no error in the decree.

The contract reads as follows:- "We, the undersigned, J. M. Thompson, being the owner of this date of five shares of stock in the J.D. Thompson Carnation Company, Helen T. Fish being the owner of two hundred and eleven (211) shares of stock of the J.D. Thompson Carnation Company, and Char. W. Fish being the owner of seventy-six (76) shares of stock of the

10, 1908, hereinafter set forth, between herself and her husband, John. The chancellor found, as a matter of fact, that the latter, John M. Thompson, owned the five shares at the time of making the contract with Helen T. Wish, and that the ownership of the stock depended upon the construction of the contract. Appellant agrees in the finding that the father, John M. Thompson, owned the five shares of stock at the date of the contract and that her case here entirely on the question of the validity and effect of that contract, claiming that it is void as against public policy, and also as an attempted testamentary disposition of property. The chancellor found the contract valid and enforceable; that it "was not a testamentary disposition of property"; that "the legal and equitable title in it to said five shares of stock were intended to be vested and ought to be vested in the said Helen T. Wish at the death of John M. Thompson," and by his decree confirmed the title of Helen T. Wish to said five shares subject to the provisions in favor of Mrs. Thompson as to division and payment of money to her by Helen T. Wish, found in the finding on seventh clause of said contract. If the contract is void for either of the two reasons suggested by appellant the decree is erroneous. If it is not void for either of the two reasons suggested, there is no error in the decree.

The contract reads as follows: "I, John M. Thompson, do hereby certify that I have sold to Helen T. Wish, my wife, five shares of stock in the T.M. Thompson Lumber Company, which I own, and which are being sold to her in order to provide for her support and the support of our children, and I have received from her the sum of \$100.00 for said stock. The T.M. Thompson Lumber Company is a corporation organized under the laws of the State of Wisconsin, and its capital stock is \$100,000.00, divided into 10,000 shares, of which I am the owner of seventy-five (75) shares, and which are being sold to her in order to provide for her support and the support of our children, and I have received from her the sum of \$100.00 for said stock. The T.M. Thompson Lumber Company is a corporation organized under the laws of the State of Wisconsin, and its capital stock is \$100,000.00, divided into 10,000 shares, of which I am the owner of seventy-five (75) shares, and which are being sold to her in order to provide for her support and the support of our children, and I have received from her the sum of \$100.00 for said stock."

J. D. Thompson Carnation Company, all of said parties of the City of Joliet, County of Will and State of Illinois, agree together as follows:-

1st. That we each and every one shall vote our respective shares of stock in the above mentioned Company at all regular, special or adjourned meetings of stockholders of said Company for each other for directors of said Company, and for no other person or persons.

2nd. That we, for the best interests of the company desire to have the following named persons elected as officers of the said above mentioned Carnation Company; J. M. Thompson for President, Helen T. Fish for Vice-President, Vera Thompson for Treasurer, and Chas. M. Fish for Secretary and General Manager.

3rd. That in case of the death of J. M. Thompson, Helen T. Fish shall have the voting of the five shares of stock standing in the name of J. M. Thompson, and that the dividends on the above five shares shall be paid to Vera Thompson.

4th. That in case of the absence of J. M. Thompson, from any meeting of stockholders of the above mentioned company, Helen T. Fish shall vote the five shares of stock standing in the name of J. M. Thompson on books of said company.

5th. That we shall not buy or sell any shares of stock of the above mentioned company without the written consent of the undersigned parties.

6th. That in case of the death of J. M. Thompson, Vera Thompson may become a party to this agreement by signing same.

7th. That in the case of the death of J. M. Thompson, Helen T. Fish shall pay to J. D. Thompson one-third (1/3) of the

J. D. Thompson Generation Company, all of said parties of the City of Joliet, County of Will and State of Illinois, agree together as follows:-

1st. That we each and every one shall vote our respective shares of stock in the above mentioned Company at all regular, special or adjourned meetings of stockholders of said Company for each other for directors of said Company, and for no other person or persons.

2nd. That we, for the best interests of the company desire to have the following named persons elected as officers of the said above mentioned Generation Company; J. D. Thompson for President, Helen T. Wish for Vice-President, Vera Thompson for Treasurer, and Chas. M. Wish for Secretary and General Manager.

3rd. That in case of the death of J. D. Thompson, Helen T. Wish shall have the voting of the five shares of stock standing in the name of J. D. Thompson, and that the dividend on the above five shares shall be paid to Vera Thompson.

4th. That in case of the absence of J. D. Thompson, from any meeting of stockholders of the above mentioned company, Helen T. Wish shall vote the five shares of stock standing in the name of J. D. Thompson on books of said company.

5th. That we shall not buy or sell any shares of stock of the above mentioned company without the written consent of the undersigned parties.

6th. That in case of the death of J. D. Thompson, Vera Thompson may become a party to this agreement by signing the same. 7th. That in the case of the death of J. D. Thompson, Helen T. Wish shall pay to J. D. Thompson one-third (1/3) of the

par value of said above mentioned five shares of stock belonging to J.M.Thompson, said par value being (\$166.66) One hundred sixty-six and sixty-six one hundredths dollars, and also to Vera Thompson the same amount.

8th. That this agreement can be changed or terminated only by the unanimous written consent of the undersigned parties.

9th. That this agreement shall be binding upon the heirs, executors, administrators and assigns of the undersigned parties.

This agreement is made in duplicate.

Witness our hands and seals this tenth day of November, 1911.

J.M.Thompson, (Seal)
Helen T.Fish, (Seal)
Charles M.Fish, (Seal) "

John M. Thompson died intestate January 15, 1912, leaving as his only heirs-at-law his children, Vera Thompson, Helen T. Fish, and John D.Thompson. There had been no administration on his estate.

Appellant argues that the contract should be held void as against public policy on the ground that it provides for perpetual control of the five shares of stock by Helen T.Fish while she was not the owner, and lays stress on clause nine providing that the agreement shall be binding upon the heirs, executors, etc. If the chancellor's conclusion that the contract provided for the ownership of the stock by Helen T.Fish on the death of her father is right, this objection is without force. Appellant cites *Luthy v Ream*, 270 Ill. 170, 180, in support of her contention.

per value of said above mentioned five shares of stock be-
longing to J.M. Thompson, said per value being (\$100.00)
One hundred sixty-six and sixty-six one hundredths dollars,
and also to Vera Thompson the same amount.

8th. That this agreement can be changed or terminated
only by the unanimous written consent of the undersigned

parties.

9th. That this agreement shall be binding upon the heirs,
executors, administrators and assigns of the undersigned

parties.

This agreement is made in duplicate.

Witness our hands and seals this tenth day of November,

1911.

J.M. Thompson, (seal)
Helen T. Fish, (seal)
Charles M. Fish, (seal)

John M. Thompson died intestate January 12, 1912, leaving
as his only heirs-at-law his children, Vera Thompson, Helen T.
Fish, and John T. Thompson. There had been no administration on
his estate.

Appellant argues that the contract should be held valid as
against public policy on the ground that it provides for transfer
control of the five shares of stock by Helen T. Fish. The said
was not the owner, and the shares on which the will was provided
the agreement shall be binding upon the heirs, executors, etc.
If the chancellor's conclusion that the contract is not of the
ownership of the stock by Helen T. Fish on the date of her death
is right, this objection is without force.
Inty v Hoem, 270 Ill. 170, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It is there said that " an agreement, the purpose and effect of which are to permit the affairs of the corporation to be managed by the determination of persons other than its stockholders, or by a minority of its own stockholders, is invalid", citing many authorities. The contract in the present case does not violate the rule there announced. John M. Thompson retained the control of his stock during his lifetime. Mrs. Fish had no absolute control of it until his death, when, under the chancellor's construction of the contract, she became the owner. We conclude the contract is not open to ^{the} objection that it is against public policy. (Venner v Chicago City Ry. Co., 258 Ill. 523)

Appellant argues that the two above quoted findings of the chancellor that the ownership of the stock vested in Helen T. Fish on the death of her father, and that it was not a testamentary disposition of the property, are utterly inconsistent, and seems to contend that any contract by the owner of personal property to control it during his lifetime and vest it in another on his death amounts to a testamentary disposition of the property, and is therefore void ~~in~~ if not executed as a will, and cites Olney v Howe, 89 Ill. 556; Comer v Comer, 120 Ill. 420, and Oswald v Caldwell, 225 Ill. 224 in support of her contention. Neither of these cases deny the right of the owner of property to make a valid contract with another, supported by a sufficient consideration, to take effect on the death of the owner. It is true the contract must be binding at and after the time of its execution and not one that the obligor can change at pleasure as he could his will. And it must not be a mere gift

It is there said that "an agreement, the purpose and effect of which are to permit the affairs of the corporation to be managed by the determination of persons other than its stockholders, or by a minority of its stockholders, is invalid," citing many authorities. The contract in the present case does not violate the rule there announced. John W. Thompson retained the control of his stock during his lifetime. Fish had no absolute control of it until his death, when, under the channel's construction of the contract, she became the owner. We conclude the contract is not void on the ground that it is against public policy. (Thompson v. Fish, 100 Ill. 527.)

Appellant argues that the two above quoted findings of the Chancellor that the ownership of the stock vested in Nelson Fish on the death of her husband, and that she was not a party to any disposition of the property, are mutually inconsistent, and seems to contend that any contract by the owner of property to control it during his lifetime and vest it in another on his death amounts to a testamentary disposition of the property, and is therefore void. It is not void as a will, but after Olney v. Howe, 39 Ill. 156; Cook v. Cook, 110 Ill. 430; Oswalt v. Oswalt, 225 Ill. 28, an agreement of that character is neither of the essence nor the gist of the contract, but only to make a valid contract. Further, suggested by a similar precedent consideration, to give effect on the death of the owner. It is true the contract may be binding as to the executor of its execution and not one that the obligor is bound to perform as he could his will. But it must not be a mere will.

as distinguished from a contract. In *Olney v Howe*, supra, the court pointed out clearly that the agreement, considered as a contract, was void for want of mutuality; therefore it was considered as an attempted testamentary disposition of property.

The clauses in the contract on which Helen T. Fish must rely for her title to the five shares of stock on the death of J. M. Thompson are the third, providing that she shall have the voting power, and the seventh that she shall pay one-third of the par value to her brother, and one-third to her sister. It is also provided in the third that dividends shall be paid to the sister. Property, strictly speaking, is "That dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects." (32 Cyc. 648)

Helen T. Fish by this agreement acquired the sole right of dominion over the five shares of stock upon the death of her father; she therefore acquired the property or ownership of the stock. The contract cannot be said to vest only a future interest in her. It gave her a present interest in the five shares of stock that they should be voted the same as her stock. If there had been nothing in the agreement other than the provision vesting this property in her at her father's death, it would have been an attempted testamentary disposition of property and void for that reason. But there was also the provision in clause one that the parties should vote their stock for each other for directors, which may be presumed to have been deemed a benefit to each of the parties to the contract. There was also in clause two that amounts to an agreement that J. M. Thompson should be elected

as distinguished from a contract. In *Olney v. Howe*, supra, the court pointed out clearly that the agreement, considered as a contract, was void for want of mutuality; therefore it was considered as an attempted testamentary disposition of property.

The clauses in the contract on which Helen T. Thau rests rely

for her title to the five shares of stock on the death of J. M. Thompson and the third, providing that she shall have the voting power, and the seventh that she shall say one-third of the per value to her brother, and one-third to her sister. It is also provided in the first that dividends shall be paid to the sister. Property, strictly speaking, is "that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects." (33 Cyc. 645.)

Helen T. Thau by this agreement acquired the five shares of stock over the five shares of stock upon the death of her father; she therefore acquired the property or ownership of the stock. The contract cannot be said to vest only a future interest in it. It gave her a present interest in the five shares of stock. They should be voted the same as her father. It gave her nothing in the agreement other than the five shares of stock. Property in her at her father's death, and it was her property. The attempted testamentary disposition of property and title to reason. But there was also the provision for the five shares of stock. Parties should vote as if they had been voted for by her father, which may be presumed to have been decided in favor of her father. Parties to the contract. There was also in the contract two shares amounts to an agreement that J. M. Thompson should be a party

president of the corporation. This was a benefit moving to him, and especially so as his small holding of the capital stock did not give him much power in controlling the offices and affairs of the company. We conclude the writing in question is, in legal effect, a valid and irrevocable contract based on a sufficient consideration, as distinguished from an attempt to make a testamentary disposition; therefore the court did not err in its decree in that regard. The decree is affirmed.

Affirmed.

Dibell, J. took no part.

President of the corporation. This was a bona fide moving to
him, and especially so as his small holding of the capital stock
did not give him much power in controlling the offices and affairs
of the company. We conclude the writing in question is, in
legal effect, a valid and enforceable contract based on a sufficient
consideration, as distinguished from an attempt to make a contra-
dictory disposition; therefore the court did not err in its
decree in that regard. The decree is affirmed.

Reversed.

Dibell, J., took no part.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.



203-617

2576

AT A TERM OF THE APPELLATE COURT,

203 I.A. 617

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 11 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Page 6

Gen. No. 6084.

203 I.A. 617

Agenda 64.

Joseph Comorowski, by Miks Comorowski,
his father and next friend,

Appellee,

-vs-

Appeal from
Bureau County.

Spring Valley Coal Company,

Appellant.

NIEHAUS, P. J.

In this case the appellee, Joseph Comorowski, by Mike Comorowski, his next friend, sued the appellant, Spring Valley Coal Company, in an action on the case in the circuit court of Bureau County, to recover damages for personal injuries sustained by appellee while employed in appellant's coal mine. There was a trial by jury, and the jury returned a verdict against appellant, finding damages to the amount of \$1600. The court rendered judgment on the verdict, and from this judgment an appeal was taken to this court.

The proof shows that the appellee was a mule driver employed in appellant's coal mine number 5, which was operated at Dalzell, Illinois, by a system called the long wall system. Under this system various entries are driven from the main shaft in various directions; and along some of the entries tracks are laid on which coal cars are drawn by mules, and by the means of these cars the coal is transported from the place where it is mined to the main shaft to be hoisted. The appellee was injured in one of such entries in appellant's mine, which is denominated as first left off of the second left, off of the southwest entry; and it is situated in the western part of the mine. At the time of his injury appellee was

203 I.A. 617

Joseph Comorowski, by Miss Comorowski,
his father and next friend,

Appellee,

-vs-

Spring Valley Coal Company,

Appellant.

Appeal from
Bureau County.

WITNESSES, p. 1.

In this case the appellee, Joseph Comorowski, by Miss Comorowski, his next friend, and the appellant, Spring Valley Coal Company, in an action on the case in the circuit court of Bureau County, to recover damages for personal injuries sustained by appellee while employed in appellant's coal mine. There was a trial by jury, and the jury returned a verdict against appellant, finding damages to the amount of \$1600. The court rendered judgment on the verdict, and from this judgment an appeal was taken to this court.

The proof shows that the appellee was a mule driver employed in appellant's coal mine number 6, which was operated at Dixfield, Illinois, by a system called the long wall system. Under this system various entries are driven from the main shaft in various directions; and along some of these entries there are laid on wheels coal cars and driven by mules, and by the means of these cars the coal is transported from the place where it is mined to the main shaft. The appellee was injured in one of these entries. The first left off of the second left, off of the northwest entry; and it is situated in the western part of the mine. At the time of the injury appellee

driving a mule, which was hitched to a loaded car, by loose chains which were attached to the front. It is claimed by appellee that while he was thus engaged in driving the mule, which was drawing the loaded car through the entry-way in question, to the main shaft, and sitting on the left side at the regular place of the driver of such a car, that the mule became obstreperous and was in the act of backing against him, so that his body was apparently in danger of being violently pushed by the mule, against the car, which was moving down the hill at the place in question; and that to avoid being crushed he jumped off to the left side and in doing so stepped on a rock, which caused him to slip and fall in front of the moving car, which then ran over his limb and broke it.

The declaration upon which recovery is based and upon which the case went to the jury, consists of four counts, three of which are based upon the statute, and one count charges common law negligence. It is charged in the declaration that the appellant had rejected the Workmen's Compensation Act, which went into force July 1, 1913; that the space on each side of the track along the entry-way in question between the rail and the wall, which was very narrow, was filled with rubbish, material, debris, pieces of rock, soap stone, fallen coal, waste wood and timbers; that in consequence there was not room enough for a person to stand or walk in order to get out of the way of the passing coal car; that it was the duty of the appellant to clear one side of this road or entry-way of refuse and materials, and that it had wrongfully and wilfully failed so to do.

The declaration also charges that it was the duty of the appellant to prove for the appellee a reasonably safe place in which to work, and reasonably safe conditions ^{der} un/which to perform his work, and that it had wrongfully, negligently and unlawfully failed

driving a mule, which was hitched to a loaded car, by loose chains which were attached to the front. It is claimed by appellee that while he was thus engaged in driving the mule, which was drawing the loaded car through the entry-way in question, to the main shaft, and sitting on the left side at the regular place of the driver of such a car, that the mule became obstreperous and was in the act of backing against him, so that his body was apparently in danger of being violently pushed by the mule, against the car, which was moving down the hill at the place in question; and that to avoid being crushed, he jumped off to the left side and in doing so stepped on a rock, which caused him to slip and fall in front of the moving car, which then ran over his limb and broke it.

The declaration upon which recovery is based and upon which the case went to the jury, consists of four counts, three of which are based upon the statute, and one count charges con on law negligence. It is charged in the declaration that the defendant had rejected the Workmen's Compensation Act, which went into force July 1, 1913; that the space on each side of the track along the entry-way in question between the rail and the wall, which was very narrow, was filled with rubbish, material, debris, pieces of rock, coal, etc.; fallen coal, waste wood and timber; that in consequence there was not room enough for a person to stand or walk in either direction on the way of the passing coal car; that it was the duty of the defendant to clear one side of this road in entry-way or return to the shaft, and that it had wrongfully and willfully failed to do so.

The declaration also charges that the defendant was negligent in failing to provide for the safe transportation of the coal cars to work, and negligently kept conditions unsafe for the transportation of coal cars to work, and that it had wrongfully, negligently, and willfully failed to do so.

so to do; but wilfully permitted appellee to work under unsafe conditions, without warning, and by allowing this entry-way to be in a defective, obstructed and unsafe condition; that the presence of this obstruction and debris caused him to be thrown in front of the moving car, when it became necessary for his safety to jump off the loaded car, by means whereof he was injured.

It is also charged that the mine examiner wilfully failed to examine this entry-way, in which the appellee was injured, within eight hours preceding the time that operations commenced in the mine on the day of the injury; and that he wilfully failed to observe whether there were any dangerous conditions, and wilfully failed to inscribe on the walls of this entry-way, or at any place along in the vicinity, the month and day of the month of his visit; and wilfully failed to place a conspicuous mark or sign at the place of such dangerous conditions as a notice to all workmen to keep put; and that he wilfully failed, on completing his examination for the day in question, to make a daily record as required by law to be made in a book kept for that purpose of the dangerous conditions of this entry-way and place; and that by reason thereof, while the appellee was driving a trip on the car at the place in question when it having become necessary for him to get off of the moving car and trip, to a place at the left side of the road, the appellee came in contact with said defective and dangerous condition in getting off and was thereby thrown in front of the moving car and injured.

Appellant insists that an improper and prejudicial question was asked of one of the jurors on his voir dire. The question asked was: " In case the jury in this case agree and conclude that the defendant is guilty, and that the plaintiff is entitled to damages, would you be willing in your verdict, would you give him all the damages he is entitled to under the law and the evidence

as to go; but willfully permitted appellee to work under unsafe conditions, without warning, and by allowing this entry-way to be in a defective, obstructed and unsafe condition; that the presence of this obstruction and debris caused him to be thrown in front of the moving car, when it became necessary for his safety to jump off the loaded car, by means whereof he was injured.

It is also charged that the mine examiner willfully failed to examine this entry-way, in which the appellee was injured, within eight hours preceding the time that operations commenced in the mine on the day of the injury; and that he willfully failed to observe whether there were any dangerous conditions, and willfully failed to inscribe on the walls of this entry-way, or at any place along in the vicinity, the month and day of the month of his visit; and willfully failed to place a conspicuous mark or sign at the place of such dangerous conditions as a notice to all workmen to keep out; and that he willfully failed, on completing his examination for the day in question, to make a daily record as required by law to be kept in a book kept for that purpose of the dangerous conditions of this entry-way and place; and that by reason thereof, while the appellee was driving a trip on the car at the place in question when it having become necessary for him to get off of the moving car and trip, to a place at the left side of the road, the appellee came in contact with said defective and dangerous condition in passing out and was thereby thrown in front of the moving car and injured.

Appellant insists that on November 22, 1912, the question was asked of one of the jurors on his voir dire. The question asked was: "In case the jury in this case agree and conclude that the defendant is guilty, and that the plaintiff is entitled to damages, would you be willing in your verdict, would you give to all the damages he is entitled to under the law and the evidence?"

in this case?" And the answer of the juror was: " I would go according to my own judgment in the matter on the evidence and the law; I do not know what amount he is suing for." The question was undoubtedly asked with reference to the possible exercise of a peremptory challenge, and we are of opinion that in that view it was competent and allowable. The answer of the juror showed him to be a competent juror to sit in the case. If the juror was not satisfactory to the appellant it had the right to challenge him peremptorily. Nothing appears in the record which indicates that appellant could not have done so if it had desired.

Appellant contends that the evidence does not support the verdict. But the record does not sustain its contention in that regard. It is only necessary to refer to the evidence concerning one of the charges laid in the declaration.

The statute requires that at least one side of haulage roads in coal mines shall be kept clear of refuse, and that the refuse shall not be permitted to be within two and one-half feet of the rails. It is true that three witnesses for appellant, - namely, the mine manager, the mine examiner and the driver boss, testified positively that the right side of the haulage road in question was clear of refuse and rocks. Another witness for appellant, John Vigna, testified that there were some little rocks on the right hand side, but further back from the place where appellee was injured. I, Paspychalli, appellant's surveyor, who made the plat of the haulage road in question, stated simply that there were no obstructions on the right hand side, but that on the left hand side where appellee was injured where the space between the rail and the rib was 1- $\frac{1}{2}$ feet, there were small rocks between the rail and the rib about as large as a fist. The appellee testified that there was refuse in the form of loose rocks along and at the rails on both sides of the haulage road, at the place where he was injured;

and that he slipped on one of these loose rocks and that it caused him to fall in front of the car. He is corroborated expressly by four witnesses, as to the refuse on both sides of the road along the rails, and by six witnesses as to the condition on the left hand side, where he was injured. It is apparent, therefore, that the preponderance of the evidence shows that this refuse was allowed to accumulate on both sides of the haulage road in violation of the statute, and as charged in the declaration. While it is true that appellant was only required to keep one side clear of refuse, yet when neither side is kept clear it cannot justly be heard to say that it never intended to keep clear the side on which the appellee was injured; and that therefore the violation of the statute had nothing to do with the injury to appellee.

The appellant also contends that the court erred in refusing to permit certain interrogatories, which were put to so-called expert witnesses, for the purpose of eliciting the opinions of the witnesses upon the question whether or not the conditions in the mine, and at the place of the injury, were safe conditions, considering appellee's work. The conditions referred to were actual conditions in the mine, and whether they were safe or not was a matter of common observation and witnesses were examined in the case with reference to such actual conditions. Under these circumstances the opinions of so-called expert witnesses are not competent. (Crooks v Tazewell County Coal Company, 263 Ill. 343; Keith v Armour & Co., 258 Ill. 28)

The record does not disclose any substantial error in the rulings of the court in regard to the admission or rejection of evidence.

Concerning errors assigned in reference to the instructions we are of opinion that there was no error in giving to the jury the

and that he slipped on one of these loose rocks and that it caused him to fall in front of the car. He is corroborated expressly by four witnesses, as to the refuse on both sides of the road along the rails, and by six witnesses as to the condition on the left hand side, where he was injured. It is apparent, therefore, that the preponderance of the evidence shows that this refuse was allowed to accumulate on both sides of the haulage road in violation of the statute, and as charged in the declaration. While it is true that appellant was only required to keep one side clear of refuse, yet when neither side is kept clear it cannot justly be held to say that it never intended to keep clear the side on which the appellee was injured; and that therefore the violation of the statute had nothing to do with the injury to appellee.

The appellant also contends that the court erred in refusing to permit certain interrogatories, which were put to so-called expert witnesses, for the purpose of eliciting the opinions of the witnesses upon the question whether or not the conditions in the mine, and at the place of the injury, were safe conditions, considering the conditions referred to were actual conditions of the mine, and whether they were safe or not was a matter of common observation and witnesses were examined in the case with reference to such actual conditions. Under these circumstances the opinions of so-called expert witnesses are not competent. (Crooks v. Tazewell County Coal Company, 258 Ill. 242; Keith v. Armour & Co., 258 Ill. 28)

The record does not disclose any substantial error in the rulings of the court in regard to the admission or rejection of evidence.

Concerning errors assigned in reference to the instructions we are of opinion that there was no error in giving to the jury the

instruction relating to the effect of a slight preponderance of the evidence. The instruction has been repeatedly approved by the courts of review in this state. Nor was there error in giving the 5th of appellee's instructions, because it applied only to the second count of the declaration, and it was not necessary to specially direct the jury's attention to this fact. The 6th, 7th, 8th, 9th and 10th instructions for the appellee set out particular provisions of the statute, the violation of which is charged in the declaration, and told the jury that if the appellant wilfully failed to comply with these provisions, and such wilful violation caused the injuries to appellee, that they should find the appellant guilty. While we do not approve of instructions of this character, it is not error to give them. (Donk Bros. Coal & Coke Co. v Peton, 192 Ill. 41; Mt. Olive & Streator Coal Co., v Rademacher, 190 Ill. 538) And the instructions are not subject to the objection made, that they assume something against the appellant.

Appellant also complains of the court's refusal to give certain instructions for the appellant, among which is the 48th instruction. This is a cautionary instruction, and inasmuch as it told the jury that each juror must exercise his individual judgment and conscience, the instruction had a tendency to induce some of the jurors to neglect to confer and consider the arguments of co-jurors, in discussing and considering the case, and thereby lead to a disagreement; and there was therefore no error committed in refusing it, especially since another cautionary instruction requested by appellant had been given. Instructions of this character have been disapproved by our supreme court. (City of Evanston v. Richards, 224 Ill. 244.)

Some of the refused instructions contained matters of law, concerning which appellant was entitled to have the jury instructed; but these matters were sufficiently set out in other instructions which the court gave, and it therefore was not error to refuse to

instruction relating to the effect of a slight preponderance of the evidence. The instruction has been repeatedly approved by the courts of review in this state. Nor was there error in giving the 48th of appellee's instructions, because it applied only to the second count of the declaration, and it was not necessary to specially direct the jury's attention to this fact. The 6th, 7th, 8th, 9th and 10th instructions for the appellee set out particular provisions of the statute, the violation of which is charged in the declaration, and told the jury that if the appellant willfully failed to comply with these provisions, and such willful violation caused the injuries to appellee, that they should find the appellant guilty. While we do not approve of instructions of this character, it is not error to give them. (Donk Bros. Coal & Coke Co. v. Peton, 122 Ill. App. 2d 101; Olive & Streater Coal Co. v. Rademacher, 120 Ill. App. 2d 101.) Instructions are not subject to the objection made, that they require something against the appellant.

Appellant also complains of the court's refusal to give certain instructions for the appellant, among which is the 48th instruction. This is a cautionary instruction, and inasmuch as it told the jury that each juror must exercise his individual judgment and conscience, the instruction had a tendency to induce some of the jurors to neglect to confer and consider the arguments of co-appellants, in discussing and considering the case, and thereby lead to a miscarriage of justice; and there was therefore no error committed in refusing it, especially since another cautionary instruction requested by appellant had been given. Instructions of this character have been disapproved by our supreme court. (City of Evanston v. Richardson, 224 Ill. 244.)

Some of the refused instructions contained matters which appellant was entitled to have the jury instructed concerning, but these matters were sufficiently set out in other instructions which the court gave, and it therefore was not error to refuse to

give them. (Hess Co. v. Davidson, 149 Ill. 145)

By the 49th instruction, which was refused, the court was asked to tell the jury that it was not intimating that a dangerous condition existed in the mine in question. The court had not given any instruction which assumed that dangerous conditions existed; and while the giving of this instruction was permissible, the court was not bound to give it under the circumstances. The appellant could, with greater propriety, have asked to have the jury instructed that the court did not intimate any opinion on any controverted question of fact, rather than single out some one question in dispute and have the jury told that the court was not passing judgment on that question, or expressing any opinion regarding it.

Instructions numbers 50, 51, 53, 55 and 56 sought to get before the jury the idea that if the mine examiner did not consider the condition that existed dangerous, then that appellee could not recover. This is not the law, and these instructions were properly refused. (Aetitus v. S.V.Coal Co., 150 Ill. App. 491, and 246 Ill. 32) And in Lolli v.S.V.Coal Co. this court held in an opinion filed March 9, 1915, " that whether or not the mine manager considers the condition in a mine dangerous, is not the criterion upon which to base the right of recovery. The conditions which it is claimed existed in this case were visible, and matters of common observation, to any mine examiner in passing by them, and the company should not be relieved from liability by the opinion of the mine examiner that it was not a dangerous condition, if the jury finds ~~that it was not~~ as a matter of fact from the evidence, that the condition was dangerous.

Instruction number 52 is a cautionary instruction, and while it would not have been error to have given this instruction, it also

give them. (Hess Co. v. Davidson, 149 Ill. 143.)

By the 49th instruction, which was refused, the court was asked to tell the jury that it was not insisting that a dangerous condition existed in the mine in question. The court had not given any instruction which assumed that dangerous conditions existed; and while the giving of this instruction was permissible, the court was not bound to give it under the circumstances. The appellant

could, with greater propriety, have asked to have the jury instructed that the court did not intimate any opinion on any controverted question of fact, rather than single out some one question in dispute and have the jury told that the court was not passing judgment on that question, or expressing any opinion regarding it.

Instructions numbers 50, 51, 52, 53 and 54 sought to tell before the jury the fact that at the mine examined did not consider the condition that existed dangerous, then that a danger could not recover. This is not the law, and these instructions were properly refused. (Atkins v. S.V. Coal Co., 150 Ill. App. 431, and 344 Ill.

32) And in *Hollis v. S.V. Coal Co.*, this court held in an opinion filed March 2, 1912, "that whether or not the mine examiner considered the condition in a mine dangerous, is not the criterion upon which to base the right of recovery. The criterion which is to be applied

existed in this case were visible, and that any or no person operating to any mine examiner in passing by them, the company should not be relieved from liability by the opinion of the examiner. If it was not a dangerous condition, it is the jury's duty to find as a matter of fact from the evidence, that the condition was dangerous.

Instruction number 55 is a question of law, and it would not have been error to have given this instruction.

is not error to refuse instructions of this character. Instruction number 57 aimed to tell the jury what was not the law in reference to a matter not material to the questions in controversy, and was therefore properly refused.

We are of opinion that there is no reversible error in this case, and the judgment should therefore be affirmed.

Affirmed.

is not error to refuse instructions of this character. Instruction
number 57 aimed to tell the jury what was not the law in reference
to a matter not material to the questions in controversy, and was
therefore properly refused.

We are of opinion that there is no reversible error in this
case, and the judgment should therefore be affirmed.

Affirmed.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

62417 62-2 75
AT A TERM OF THE APPELLATE COURT,

2031.A. 628

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

NOV 4 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Beard (1911)

in 1911

with

Presented

PL 11.11.11

the Clerk

following

Gen. Nos. 6241, 6242.

Ag. No. 83.

203 L.A. 628

Leslie P. Voorhees,
Defendant in Error,

-vs-

Error to Will.

Hannah E. Mason, Executrix,
etc., et al,
Plaintiffs in Error.

CARNES, J.

Leslie P. Voorhees, the defendant in error, owned five shares of the capital stock and five income certificates of the Joliet Tropical Plantation Company, and as such stockholder filed his bill in equity May 21, 1906, for an accounting of the corporation by six of its seven directors for the full value of certain of its stock and income certificates, which it was alleged they had wrongfully issued to themselves individually on payment to the corporation of one half the value thereof, and for dividends they had drawn thereon, and also for an accounting as to certain commissions they were charged with wrongfully taking on sales made by them of other stock and certificates of the corporation. The bill was filed in behalf of the complainant and such other stockholders as might choose to join therein, but no other stockholder did so join.

The corporation was organized under the laws of Delaware July, 1902, with an authorized capital stock of \$150,000. divided into 15,000 shares, with a par value of \$10. each. Its principal business was the acquiring of lands in Mexico, and cultivating coffee, rubber, and other agricultural products. 1264 shares of the capital stock had been issued. The actual business of the company was transacted at Joliet, where the six defendant directors lived.

Ag. No. 88.

Gen. No. 6341, 6342.

880 A. 1808

Leslie P. Voorhes,
Defendant in Error.

Verdict to Will.

-78-

Hannah E. Mason, Executrix,
etc., et al,
Plaintiffs in Error.

CARNES, J.

Leslie P. Voorhes, the defendant in error, owned five shares of the capital stock and five income certificates of the Joliet Tropical Plantation Company, and as such stockholder filed his bill in equity May 21, 1906, for an accounting of the corporation by six of its seven directors for the full value of certain of its stock and income certificates, which it was alleged they had wrongfully issued to themselves individually on payment to the corporation of one half the value thereof, and for dividends they had drawn thereon, and also for an accounting as to certain commissions they were charged with wrongfully taking on sales made by them of other stock and certificates of the corporation. The bill was filed in behalf of the complainant and such other stockholders as might choose to join therein, but no other stockholder did so join.

The corporation was organized under the laws of Delaware July, 1902, with an authorized capital stock of \$150,000, divided into 15,000 shares, with a par value of 10 cents. The tropical business was the acquiring of lands in Mexico, and cultivating coffee, rubber, and other agricultural products. 1904 shares of the capital stock had been issued. The annual business of the company was transacted at Joliet, where the six defendants and directors lived.

The seventh director was a resident of Delaware, apparently taking no part in the transactions here questioned. Early in the history of the company a plan was devised and put in execution to issue income certificates of no par value but to be sold to the purchasers of stock, one certificate to each share of stock for the total sum of no less than \$300. (\$290. for the certificate, and \$10. for the share of stock) It was also provided that the purchaser might pay for such income certificates in installments, and that the subscription should leave it optional whether the purchaser completed the payment and received his certificate, or left the installments unpaid and his subscription to be adjusted by the company by the re-sale of the certificate in a manner there provided. Afterwards in February, 1903, the directors increased the price of each share of stock, with its accompanying income certificate, to \$350. Prior to the filing of the bill 1261 income certificates had been issued, which corresponded with the number of shares of stock sold except there were three shares of stock donated to the Delaware director with no accompanying certificates.

The bill alleges that the defendant directors granted to themselves individually the right to subscribe, and did individually subscribe, for the purchase of 10 shares each of the capital stock, and 10 income certificates at one half the established price, and afterwards, under a similar grant, each individual defendant director purchased 20 shares of stock and income certificates at half price, and that they had received dividends from the corporation on stock and income certificates so issued to them.

Also that said defendant directors had wrongfully paid to themselves a commission of ten per cent, of the par value of all

The seventh director was a resident of Delaware, apparently taking no part in the transactions here mentioned. Early in the history of the company a plan was devised and put in execution to issue income certificates of no par value but to be sold to the purchasers of stock, one certificate to each share of stock for the total sum of no less than \$500. (\$250. for the certificate, and \$10. for the share of stock) It was also provided that the purchaser might pay for such income certificates in installments, and that the subscription should leave it optional whether the purchaser completed the payment and received his certificate, or left the installments unpaid and his subscription to be adjusted by the company by the re-sale of the certificate in a manner there provided. Afterward in February, 1903, the directors increased the price of each share of stock, with the accompanying income certificates, to \$750. Prior to the filing of the bill 1901 income certificates had been issued, which corresponded with the number of shares of stock sold, except there were three shares of stock donated to the Delaware director with no accompanying certificates.

The bill alleges that the defendant directors agreed to themselves individually the right to subscribe, and did individually subscribe, for the purchase of 10 shares each of the original stock, and 10 income certificates at one half the established price, and afterwards, under a similar grant, each individual director purchased 20 shares of stock and 20 income certificates at half price, and that they had received dividends upon the subscription on stock and income certificates at a rate of 10%.

Also that said defendant directors had themselves a commission of ten per cent. of the price of the stock and income certificates sold.

stock and income certificates sold by each director. The bill was answered, insubstance admitting the alleged transaction of the defendant directors in the purchase of stock and income certificates, and alleging in justification that they were by a vote of the stockholders authorized to so purchase the same in compensation for services that they had rendered the corporation. Also admitting the receipt of commissions of the sales of capital stock and income certificates. The trial court heard the case on the pleadings and evidence, and dismissed the bill for want of equity. The complainant appealed to this court, where it was heard, and our opinion reported in 148 Ill. App. 647 recited that the defendant directors each received 30 shares of stock and accompanying income certificates at \$150. per share, while other parties paid \$300. or more, and directed an accounting between the individual defendant directors and the company, and ordered, among other things, that in such accounting each of said directors should be charged with the full price of each share of stock and income certificate taken by him at half price, and with the dividends on said certificates received by him on said stock and income certificates, and half the dividends paid to him. The case was heard in the supreme court on writ of error (245 Ill. 256) where certain directions of this court as to other matters in the accounting were held erroneous, and the case remanded to the circuit court for further proceedings in accordance with the views expressed in the opinion of the supreme court, one of which views was that the appellate court did not err in requiring the defendant directors to account to the corporation for the full value of said stock and income certificates, and to repay the dividends which they had unlawfully withdrawn from the treasury of the corporation. The case was re-instated in the circuit court

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where the defendant directors filed a cross bill setting up matters in discharge of their liability to the corporation. Complainant Voorhees filed a demurrer to the cross bill, which the court overruled and entered a decree dismissing the original bill. On appeal by Voorhees we reversed that decree and remanded the cause with directions to sustain the demurrer to the cross bill. (182 Ill.App. 569) We said the supreme court viewed the directions of this court to account for the full value of the stock and income certificates and dividends thereon as correct and proper, and therefore that question was finally determined, and that the amount to be recovered on account of stock and income certificates issued to the directors at fifty cents on the dollar was ascertained by charging them with the full value thereof; that is, the half unpaid, and of the amount of dividends they had received thereon charged on the same basis; that the record showed both by the pleadings and proof the amount of those dividends; that under the opinion of the supreme court there should be an accounting as to what their services in the matter of commissions were reasonably worth, and they should be charged with what they had received on that account, if anything, more than said services were so worth. The three opinions above referred to should be read for a more complete statement of the questions involved and decided.

The cause was re-instated in the circuit court, and March 2, 1914, a decree was there entered sustaining the demurrer and dismissing the cross bill, and for an accounting directing that the individual defendant directors be charged with one half of the "par value" of said stock and income certificates, treating that value as fixed by the former adjudications. (Truman A. Mason, one of said defendant directors, had died pending the litigation, and his executrix, Hannah E. Mason, substituted as a party to the

where the defendant director filed a cross bill setting up matters

in discharge of their liability to the corporation. Complained.

Voorhees filed a demurrer to the cross bill, which the court over-ruled and entered a decree dismissing the original bill. (On appeal.)

by Voorhees we reversed that decree and we added the clause with directions to sustain the demurrer to the cross bill. (188 Ill. 39.)

529) We said the supreme court viewed the directions of this court to account for the full value of the stock and income certificates

and dividends thereon as correct and proper, and therefore that question was finally determined, and that the amount to be recovered

on account of stock and income certificates issued to the directors at fifty cents on the dollar was ascertained by charging that with the

full value thereof; that is, the half unpaid, and of the amount of dividends they had received the sum charged on the same basis;

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The cases are re-instated in the circuit court, and when

2, 1914, a decree was entered reversing the decree of the circuit court, dismissing the cross bill, and for an accounting of the directors

the individual defendant directors as charged with the full value of "per value" of said stock and income certificates, to which the

value as fixed by the former judgment. (191 Ill. 100.) one of said defendant directors, had died pending the litigation, and his executor, Hannah E. Hoyer, substituted as a party to the

suit. Orders of court properly observed this substitution. No question is made on that; therefore in speaking of the defendant directors we need not notice such death and substitution)

The decree ordered the directors to account for " said unpaid half of the par value of said shares and income certificates so wrongfully appropriated by them, with interest at the rate of five per cent. and for all dividends so wrongfully paid, with interest from the times the same were paid to defendants." It further included an order for an accounting as to commissions, that was no doubt in accordance with the final directions in that regard of the former opinions. It referred the cause to the master in chancery, and directed him in stating the accounting to charge each of said directors with the sum of \$4500. par value of the unpaid half part of said 30 shares and said 30 income certificates wrongfully converted by him, together with interest on \$1500. thereof from July 16, 1902, and \$3000. thereof from December 29, 1902, at five per cent. and to credit each defendant director with all payments, if any, made by him on said half part of said shares and income certificates since the commencement of the suit, and to charge each director with all dividends at any time paid to or retained by him out of the funds of the corporation on the unpaid half part of said income certificates or shares so wrongfully appropriated, with interest from time of receipt thereof at five per cent. and ordered the master to report his conclusions of law and fact, reserving further directions until the coming in of the master's account and report, with liberty to the parties to apply for further directions.

January 13, 1915, the defendants filed a petition to modify said decretal order of reference of March 2, 1914, reciting that the

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 ed the master to report as aforesaid, with and without, reserving
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 and report, with liberty to the parties to apply for further dire-
 ctions.

January 12, 1913, the defendant filed a petition to modify
 said decretal order of reference and such 2, 1913, holding that the

master in chancery had concluded the taking of proofs, but had not reported; that the case now presented by the record and evidence upon said hearing before the master is such as to call for a change in the order for accounting; that the direction in said order of reference leaves the master no discretion except as to the amount of commissions to be allowed to the defendant directors on sales of stock and income certificates; that the supreme and appellant court decisions indicate that the defendant directors should account "not for a 'par value' of such stock and income certificates, but for the 'full value' thereof, and no suggestion is there made as to the mode by which such value be determined; that said income certificates never had any par or market value, but that the selling price thereof was authorized by stockholders to be fixed from time to time by the board of directors; that it was shares of stock only that had a par value, and this was established at \$10. by the charter, each share of stock invariably accompanying and the amount thereof credited on price of every income certificate sold; that said shares and income certificates are shown to have no market value whatever; that in such case the basis of recovery, if any, is the real value of said 30 shares and 30 income certificates at the time of alleged wrongful conversion or contracts therefor by defendants, which value appears from assets, liabilities and dividends of the company as shown by testimony before the master." Also that the master should be given greater discretion in matter of computation of interest; that the defendant directors should not be charged with interest on the amounts indicated in the order because said shares of stock and income certificates were to be paid for on the installment plan, payments in some instances extending over a period of several years before the half price in cash was paid in full and the purchaser entitled to have

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the same issue to him by the company, reciting the dates and amounts of payments by the several defendant directors under their contracts to pay one-half the price of the stock and income certificates, and that except in one instance the full amount of cash installments was not paid the company until the year 1910, and in some instances the amount has not yet been paid, and that the defendant directors received no dividends "except in proportion to amount of cash or its equivalent actually paid upon their contract for said shares and income certificates." Also that said contracts were in no manner enforceable, but open to rescission at any time by the purchaser; that the only portion of said contract obligatory upon the purchaser was that he should pay \$10. per share for shares of stock accompanying any corresponding number of certificates, but in respect to the certificates the contract was not binding.

The court disposed of said petition by entering an order that the master state an account in strict conformity with the decree of March 2, 1912, and also state another account departing from the terms of said decree, among other things, by ascertaining and reporting the number of income certificates each defendant director contracted for, at half price, whether said certificates were delivered to the several subscribers, and, if so, when, how much each has paid upon such income certificates contracted for at half price, and when, and the principal amount at its face value remaining unpaid on each such certificate, and whether the contract to pay was positive or optional and amount and date of payment of each defendant, and the amount of each such dividend paid in excess of what was paid to other holders of income certificates, and to report interest at five per cent. per annum on such excess from date when received.

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principal amount at its face value remaining unpaid on each such
certificate, and whether the contract for the certificate is optional
and amount and date of payment of a dividend, and the amount
of each such dividend paid in excess of what was paid to other
holders of income certificates, and to report matters of five
cent per annum on such excess from date when received.

The master heard further testimony and reported his conclusion as to the amount to be charged to each defendant director on account of said half price stock and certificates, and commissions, under the provisions of the original decree as follows:-

| | | |
|----------|-----------|-------------|
| Skeel, | - - - - - | \$ 7778.00; |
| Barrett, | - - - - - | \$3826.68; |
| Mason, | - - - - - | \$ 8374.63; |
| Allison, | - - - - - | \$ 7712.24; |
| Carey, | - - - - - | \$ 7777.11; |
| Antram, | - - - - - | \$ 7416.42. |

He also reported under the decree, as modified, that no dividends were paid on shares of stock, but such dividends as were paid were upon the income certificates; that the contracts of each of said defendant directors for income certificates at half price were optional except the sum of \$10. per share, which was in full for the stock accompanying said certificates, and also applied on the purchase price of such certificates; that the contracts signed by the defendant directors were identical in form with those signed by all other subscribers for such income certificates; that in such contracts it was provided that " the payment of installments on this contract shall not be compulsory except in case of the first four payments, which pays for the shares of capital stock purchased, and also applies on the price of the income certificates; there is no further legal liability for the deferred payments or the debts of the company." That the contracts also contained clauses providing for forfeiture on failure to complete payments and for re-sale by the company to the best advantage, and to pay the proceeds, after deducting a reasonable charge for re-selling, to the delinquent purchaser. It also appeared, as we understand it, that holders of income certificates partially paid received dividends in proportion to the amount paid by them on such certificates, but that the de-

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| | | |
|------------|----------|-----------|
| \$ 7778.00 | Sheel, | - - - - - |
| \$ 8888.88 | Barnett, | - - - - - |
| \$ 8884.88 | Mason, | - - - - - |
| \$ 7778.88 | Allison, | - - - - - |
| \$ 7777.11 | Carey, | - - - - - |
| \$ 7416.42 | Antnam, | - - - - - |

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defendant directors were credited with payments in excess of the amount they had paid in cash in computing the amount of dividends due them. He states the amount of extra dividends and interest thereon received by each defendant director the same in each of his two reports.

Objections and exceptions by each party were heard by the master and the chancellor, and a decree entered overruling all exceptions and confirming the report insofar as it purports to be in strict conformity with the decree of March 2, 1914, and that the corporation recover from the several defendants the amounts respectively found in the report, with interest thereon, to the date of the decree, and in favor of the complainant for costs of suit. Afterwards the board of directors, of which the defendants, Barrett, Skeel, Carey and Antram were a controlling part, on the authority of the vote of a majority of the stockholders, caused to be entered of record a release of the money decree in favor of the corporation for the recited consideration of one dollar, and the release to the corporation of all claims of the defendant directors for services rendered. The complainant filed a petition setting up those facts and alleging that because of the revolution in Mexico the property of the corporation had become practically worthless and that it had no considerable assets except what may be recovered under the decree, and asking that a receiver be appointed to collect and administer said assets, and that the defendant directors be enjoined from prosecuting any suit to recover for services that had been passed upon by the former decrees and orders, and that the satisfaction of said decree be canceled. It appeared on the hearing that the services for which compensation was claimed by the defendant directors were those that had been performed and a subject of adjudication therefor, and the chancellor entered an order that the satisfaction of the decree of record be expunged; that the defendant directors be enjoined from

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prosecuting any suit to recover for such services, and appointing a trustee to receive and collect the proceeds of said decree.

The complainant ~~xxx~~ also asked for an order allowing him solicitors fees and expenses in the prosecution of this litigation, which the court refused, holding that the same could be heard and adjusted in the future administration of the property of the corporation when it should be ascertained how much was realized from the collection of its demands under the decree.

The defendant directors prosecute this writ of error to review the whole record. The corporation appears here by counsel and confesses the errors assigned by the defendant directors, and the complainant assigns various cross errors, one of which being that the decree against the defendant directors should have been that they jointly and severally pay instead of against each one individually. The defendant directors also appealed to this court from the final order. The two cases were consolidated, and are considered as one in this opinion.

The defendant directors in their brief here state their points made upon the record as follows:-

" (1) That the errors assigned by the individual plaintiffs in error, being confessed and admitted by the corporation, the only adverse party in interest in the decree and all rights in that behalf, it is the duty of the court in such case to reverse, as in other cases of confession of error.

(2) That said final decree of June 21, 1915, and all money and proceeds to be derived therefrom, belong to and should go to the corporation, and that irrespective of the causes and questions involved leading up to and resulting in said decree,

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The complaint ~~was~~ also asked for an order compelling him solicitors fees and expenses in the prosecution of this litigation, which the court refused, holding that the same could be found and adjusted in the future administration of the property of the corporation when it should be ascertained how much was realized from the collection of its demands under the decree.

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(2) That said final decree of June 21, 1901, and all costs and proceeds to be derived therefrom, belong to and should go to the corporation, and that irrespective of the causes and questions involved leading up to and resulting in said decree,

"the corporation, as exclusive owner and beneficiary, had the unqualified right to dispose thereof the same as any other species of property owned by it and for such consideration as the stockholders, or a majority, in good faith believed was sufficient and for the welfare and benefit of the company.

(3) That the proceedings of the corporation and its stockholders resulting in the execution of the satisfaction and release of said decree, were intra vires and purely within the domain of the policy, affairs and management of the enterprise and business, and a subject matter about which Courts have no jurisdiction or concern; where, as here, no dishonest purpose amounting to fraud is shown, no law violated, no credit injured, and no charter or statutory provision transgressed."

We regard these contentions of plaintiffs in error as entirely disposed of in the former decrees and ordered entered in the case. It is true that complainant is a small stockholder. No other stockholder has joined with him in prosecuting this suit. Practically all the other stockholders have, from the beginning, believed that the defendant directors were honestly entitled to what they had received and should not be compelled to account for the same. The trial court twice attempted to give effect to this manifest wish of the majority of the stockholders. The first time the case was considered in this court it undertook to so far comply with the desire of the stockholders other than complainant as to make the decree effective only as to complainant's pro rata share in the recovery. It was settled by the decision of the supreme court that these attempts contravened established principles of law and were unavailing. The law has compelled the prosecution of this suit for the benefit of the corporation step by step against the wishes of the directors, officers, and practically all the stockholders of the company except

"the corporation, as exclusive owner and beneficiary, had the
unqualified right to dispose thereof the same as any other
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the stockholders, or a majority, in good faith believed was
advisable and for the welfare and benefit of the company.
(3) That the proceedings of the corporation and its
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claim is considered to be a minority claim. It is not a claim of the
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-31-

the complainant. We see no room for the contention that after this has been done the officers of the corporation with the consent of a majority, or all of the stockholders except the complainant, may release the decree and abandon the fruits of the victory. Therefore, we conclude the court did not err in ordering the record of the release canceled, and we think it may follow without further discussion that there was no error in appointing a receiver and enjoining the defendant directors from prosecuting suits based on claims that had been the subject of consideration in the former litigation. It follows that the confession of errors on the record here by the corporation does not warrant a reversal of the decree.

The decree of March 2, 1912, under which the accounting was made, was in substantial conformity with the final directions found in the opinion of the supreme court and the last opinion of this court. It is true that the income certificates, strictly speaking, had no "par value". Their selling price was fixed from time to time by the board of directors. It is also true that their market value at the time they were wrongfully appropriated by the defendants is the basis of recovery. But it is not true that they had no market value. The record shows that many of them were sold presumably at the prices fixed by the directors and at the prices charged these defendants in the accounting. They probably had no market value in the sense that stocks and bonds listed on the exchanges have a market value, and it is true that in the light of subsequent events they may have had no intrinsic value at the time they were received by the defendant directors, but they were treated then as of a certain fixed value. The first opinion of this court so discusses them, and the last opinion of this court directs that they be so treated in the accounting. If they had a less value

the complaint. We see no reason for the contention that after this has been done the officers of the corporation with the consent of a majority, or all of the stockholders except the complaint, may release the losses and abandon the fruits of the victory. Therefore, we conclude the court did not err in ordering the record of the release canceled, and we think it may follow without further discussion that there was no error in appointing a receiver and enjoining the defendant directors from prosecuting suits based on claims that had been the subject of consideration in the former litigation. It follows that the confession of error on the record here by the corporation does not warrant a reversal of the decree.

The decree of March 8, 1918, under which the accounting was made, was in substantial conformity with the final directions found in the opinion of the supreme court and the last opinion of this court. It is true that the income certificates, strictly speaking, had no "par value". Their selling price was fixed from time to time by the board of directors. It is also true that their market value at the time they were wrongfully appropriated by the defendants is the basis of recovery. But it is not true that they had no market value. The record shows that many of them were sold presumably at the prices fixed by the directors and at the prices charged these defendants in the accounting. It is also true that market value in the sense that appears in the list on the exchanges have a market value, and it is true that in the light of subsequent events they may have had no intrinsic value at the time they were received by the defendant directors, but they were treated then as of a certain fixed value. The first opinion of the court so discusses them, and the last opinion of this court decided that they be so treated in the accounting. It may be a fair value

that question should have been raised in the former proceedings. The courts could not then forecast the loss and destruction of the property on the one hand, or great gains to accrue from its appreciation on the other hand. It is quite probable that at the time the stock and certificates were appropriated by the directors they reasonably expected an appreciation instead of a depreciation of value, and there was an appreciation of \$80. a share in a short time after their first purchase. Neither the fact of great appreciation or depreciation since the appropriation of the stock and certificates is material now.

It is true that the contracts under which the defendant directors received the income certificates were optional. They might, if they chose, after paying the full value of the stock at \$10. a share, make no further payments on the income certificates, in which event the company undertook to reimburse itself by a re-sale of the certificates. We need not determine what effect, if any, this form of contract would have had if it been considered by this court when the first direction for an accounting was made. It apparently was not considered, and we presume it was not then called to the court's attention. The court made a definite order as to that feature of the accounting, and the supreme court adopted it. It seems to us to be beyond controversy now.

We do not understand that the defendant directors are harmed in the accounting in matter of dividends charged and interest thereon because of the fact that their contracts were payable in installments; as we have said before, that charge is the same in both methods pursued by the master in stating the account. We understand the effect of that feature of the accounting was to

that question should have been raised in the former proceedings. The courts could not then forecast the loss and destruction of the property on the one hand, or great gains to accrue from its appreciation on the other hand. It is quite probable that at the time the stock and certificates were issued by the directors they reasonably expected an appreciation in value of a depreciation of value, and there was an appreciation of value, a share in a profit after their first purchase. However, the fact of great appreciation or depreciation since the issue of the stock and certificates is material now.

It is true that the certificates under which the shareholders received the income certificates were not registered, that is, if they chose, after paying the full value of the stock of \$10. share, make no further payments on the income certificates, in which event the company understood no response should be made by a shareholder to the certificates. We need not determine what effect, if any, this form of contract could have had if been considered by this court when the first dividend for an accounting was made. It is apparently was not considered, and no return is made when asked to the court's attention. The court made a definite order to the effect of the accounting, and the return was made. It seems to me to be beyond controversy now.

We do not understand the court's action in this case as based in the accounting in fact. It is based in the accounting in fact. The reason because of the fact that the court's action is based in the accounting in fact, and we do not believe that the court's action is based in the accounting in fact. Both methods are based by the nature of the accounting in fact. We understand the effect of what is stated in the accounting in fact.

charge each director with the actual amount of money that he received as dividends in excess of what he would have received considering only the actual cash paid by him on the purchase price of the shares of stock and income certificates.

The master reported, and the chancellor allowed the full amount of ten per cent. commission to the directors on their sales of stock and income certificates. Complainant objects to this, but under the evidence we do not think there was any error in this regard. We are also of the opinion that the court strictly followed the directions of the supreme court and this court in charging the amounts to the defendant directors severally instead of charging it to them jointly and severally, as complainant contends should be done.

The foregoing discussion covers what we regard as the substantial questions raised on this record. They are suggested by counsel in varying forms, but a more extended notice of the arguments would unduly extend this opinion, already too long.

We find no error in the record, therefore the decree is affirmed.

Affirmed.

Dibell, J. took no part.

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substantial questions raised on this record. They are suggested by
counsel in varying forms, but a more extended notice of the arguments
would unduly extend this opinion, already too long.
We find no error in the record, therefore the decree is
affirmed.

ATTORNEYS.

Dibell, J. took no part.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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